The Central Law Journal.

ST. LOUIS, SEPTEMBER 5, 1890.

One of the recent opinions of the appellate court of Illinois is of interest, partly because the transaction in question was a gambling scheme, on the Chicago board of trade, and, therefore, under the statute, void, but principally because the party who evoked the law for his protection was a minister of the gospel. We know no reason or law why even a clergyman is not at liberty to repudiate his gambling debts, if he so chooses, but in the future, to offset this case, we shall be on the lookout for a gentleman of that profession who, being on the winning side in such a transaction, insists upon repudiation and restoration of his ill-gotten gains. The learned judge of the Illinois court, in delivering the opinion, felicitously remarks: "The very fact that the conscience of this honest clergyman pricked him as he stood on the charmed circle of the 'corn pit' and watched the conflict between the 'bull and bears,' and looked with longing eyes upon the golden calf he was about to worship is a circumstance, not without signification, as showing what the intention of the appellant was."

We give place below to a very readable communication from Mr. Sam. Kimble, of Manhattan, Kansas, who, in taking exceptions to a recent editorial, on the subject of injunction of State officers, by federal courts, in the application of the "original package" law, gives us a clear idea of the points at issue in the Kansas cases referred to. We see now that the decision of the United States judges did not go to the length reported, and that our mistake in the matter was the result of a misconception of the pleadings by the reporter. We took occasion, however, to say distinctly that the decision might be in harmony with the principal case, and that it was calculated to cause much uncertainty and embarrassment in the enforcement of State laws. And we are still of that opinion. And, furthermore, we do not believe that the recent enactment of congress will, in the end, relieve the difficulty. Mr. Kimble says:

As a constant and always interested reader of the JOURNAL, I was somewhat surprised at your editorial, page 101, of the issue of August 8th, 1890. From the manner of your discussion of the cases pending before Judges Foster and Phillips at Topeka, I am fully satisfied that you are laboring under a serious misunderstanding of the whole issue brought before the United States court. Quoting from your editorial you say: "It is there declared, in effect, that imported liquors cannot be reached by the State even for purposes of investigation, and that the man who has such liquors in his possession is thereby practically exempt from any sort of local interference. That is to say, the State is forbidden to institute proceedings against a dealer in original packages for any purpose whatever; the plea that the liquors have been introduced from another State is a bar, not only to punishment under prohibitory laws, but also to action designed to ascertain if any other local law is being violated. Thus a given article of commerce is invested with a sacredness, so to speak, and the dealer in original packages may laugh to scorn all statutes that dealers in other things are required to obey." I would beg leave to state, as the attorney for the complainants in one of these many actions instituted in the United States circuit court, that the above propositions, as made by you, are so erroneous as to cause me some surprise, knowing that the CENTRAL LAW JOURNAL usually wishes to discuss legal propositions in a fair manner. My informatian on these cases leads me to know that they are somewhat alike, and the facts in the case of Geo. Hemsley, agent for Glasner & Barzen, the Kansas City importers, the one in which I filed bill of complaint, do not furnish anything to support your proposition that the suit was instituted to prevent the investigation and punishment by the State courts under any and all circumstances. After the decision of the Supreme Court of the United States in Leisey v. Hordin, and in full compliance with the law laid down in that decision, Glasner & Barzen, importers of intoxicating liquors at Kansas City, established an agency at Manhattan, Kansas, employing Hemsley as their manager.

Shortly after the agency began business, an application was made to the district court of the State, under section 13 of the prohibitory law of Kansas, asking for an injunction to restrain Hemsley from keeping open such agency, on the grounds that such agency was a place where intoxicating liquors were sold and was a nuisance. Upon the filing of this application, the judge of the district court granted a temporary injunction and commanded that such agency be closed. Under the provision of section 13 of the prohibitory law, such injunction is granted without any bond being filed by the applicant, and so far as the recovery of any damages are concerned, the defendant, in such case, would be wholly without remedy, whether such injunction was properly granted or not.

After this temporary injunction was granted and served, I made application, on behalf of the defendant Hemsley, to the same judge of the State district court, asking that such temporary injunction be dissolved and set aside, and a hearing was had upon such motion, in which evidence was heard, on behalf of the plaintiff and defendant, and the judge of the district court made findings of fact, in which he found from the evidence before him that Hemsley was the agent of the importers only, that he received the intoxicating liquors and sold them in the original packages only, and that at the place of business no sales were made to minors or habitual drunkards; no disorderly conduct was permitted; no drinking was allowed about the premises, and that the peace and quiet of no one was disturbed; in short, that Hemsley, as agent, was conducting an original package house strictly and conscientiously, as had ever been done under the law of the United States, and doing nothing to make such place of business a nuisance at the common law, or a nuisance in fact. Upon such state of facts, it would seem the temporary injunction should at once have been dissolved and no further interference attempted with conducting the business in such manner.

But the courts of the State of Kansas would not do this, but undertook, under color of authority and regardless of the Supreme Court of the United States, to say, "that while we recognize the decision of the Supreme Court of the United States as the law of the land, and that the importer has the clear right, under such decision, to import and sell intoxicating liquors in the original package into the State, notwithstanding the prohibitory law, yet the place, the twelve inches of soil, the room in which such legal sale is made, by the same prohibitory law is made a nuisance and must be abated." And in accord with such holding refused to dissolve the injunction, and by virtue of keeping the original injunction in force, must be presumed to threaten "to deprive, under color of the prohibitory law of the State of Kansas, the clear right and privilege secured by the constitution of the United States," as interpreted by the supreme court to Hemsley, the agent of Glasner & Barzen, to sell intoxicating liquors in the original packages.

It would seem to me that if the 16th subdivision of the section defining jurisdiction of the circuit courts of the United States means anything, or was ever intended to serve any purpose, it authorizes the presentment of just such facts as surrounded Hemsley, to the consideration of the circuit court of the United States for relief; and authorized him to ask that the officers of the State court be restrained from doing and attempting to do, under color of their offices, or under color of the prohibitory law, those things that they had no legal right to do. In presenting Hemsley's case I at no time attempted to claim, but that the State could legitimately and properly prosecute him in good faith for the keeping of a nuisance in fact. That is, if an original package agent should so conduct his place of business in a disorderly manner, or should allow crowds to assemble about the same, and permit loafers indiscriminately, or should keep the same open on Sundays, or should in any other manner conduct the place so as to be grossly scandalous to the peace and quiet of the public, or should persistently sell to minors, then such agent could and should be prosecuted for keeping a nuisance in fact, and that such place could and should be abated. And if the State had in this case been in good faith attempting to do that, no application would ever have been made to the circuit court of the United States. And it is but fair to Judge Foster to say that in deciding the application for injunction against the officers of the State court to restrain the alleged illegal acts, under color of their offices and under color of the prohibitory law, that he took occasion to say that if the State was attempting, in good faith, to prosecute the complainant for the keeping of a nuisance in fact, and was not attempting to simply harrass and annoy the complainant by depriving him of a clear legal right, the United States court would not interfere.

Upon the hearing of this application the facts stood admitted by the officers of the State court then present before Judge Foster, and admitted that Hemsley had done that only which he had a right to do if the decision of the Supreme Court of the United States was right, and rendered nugatory the effects of section 13 of the prohibitory law. You say in your article "if this power may be used in one instance it may as well be used in others, and it will be difficult to tell where federal jurisdiction ends and State jurisdiction begins." This position it seems to me to be exceedingly frivolous, and such a one as a federal court might avail itself of, in case it wanted to avoid an examination of a case properly presented to it. Subdivision 16, of the law defining jurisdiction of the circuit courts of the United States, reads as follows: "Sixteenth: Of all suits authorized by law to be brought by any person to redress the deprivation, under color of the law, statute, ordinance, regulation, custom, or usage of any statute, of any right, privilege, or immunity, secured by the constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." Now, in the bill of complaints filed by these parties, it is alleged that the defendants, the officers of the State court, were doing certain alleged acts, and *that under color of their offices* they sought to deprive the complainants of a right and privilege granted to them under the constitution of the United States. Now, if this allegation be true there is no question whatever of the jurisdiction of the federal court, because the laws of the United States have expressly commanded that jurisdiction to the federal court. If the officers of the State court should be able to show, in answer to the bill of complaint, that the

allegations are not true, I warrant you that the federal court will not attempt to exercise jurisdiction; and if the officers of the State court in the Hemsley case, to which I have referred, had made showing to Judge Foster, to the satisfaction of the court, that they *were not* doing and attempting to do as was alleged in the bill of complaint, I am as well satisfied that the temporary injunction made against the officers of the State court would not have been issued. The officers present before Judge Foster, failed to deny and in substance admitted the truth of the matter laid in the bill of complaint.

Where you have any reason to apprehend any conflict between the State and federal jurisdiction under such circumstances passes my understanding. The fact of the matter is, newspaper comment has gone a little wild over the legal situation, and the progress of this hearing before the United States court has not always been correctly reported. You must remember that some of the State papers, particularly the "*Topeka Capital*," were attempting to cast as much odium as possible upon the federal courts, intending to create the impression that the judgments and orders made by Judges Foster and Phillips were arbitrary and with a total disregard of the law. Such was not the case, and I trust that a clear understanding of the facts presented in the pleadings will cause you to understand that no serious conflict has arisen between the federal and State jurisdictions, except as it is sought to be advanced for political purposes.

I feel the above explanation is due in view of the erroneous import given out by your editorial, first referred to.

NOTES OF RECENT DECISIONS.

DEATH BY WRONGFUL ACT — ACTION BY FOREIGN ADMINISTRATOR.—In Ash v. Baltimore & O. Ry. Co., 19 Atl. Rep. 643, the Court of Appeals of Maryland consider the effect of statutes providing actions for death by wrongful act upon the right of a foreign administrator to sue for same. Code Maryland, art. 67, § 1, provides that an action for the death of a person caused by the wrongful act or neglect of another shall be brought by the wife, husband, parent, or child of the deceased, to be prosecuted in the name of the State for the use of the persons entitled. Code W. Va. p. 709, § 6, provides that "every such action shall be brought in the name of the personal representative of such deceased person." It was held that an administrator appointed in Maryland could not sue in Maryland under the West Virginia statute, for the death of his intestate caused by negligence in West Virginia. Alvey, C. J., says:

The plaintiff was bound to show, both by pleadings and proof, that she had a right, upon the law and the facts, to maintain the action; and, as this is a special action founded exclusively upon the statute of a neighboring State, the only principle upon which it can be sustained in the courts of this State is that of comity; and if it be not sustainable upon that ground, there was clearly no error committed by the court below in withdrawing the case from the jury. There is no pretense that this action is maintainable at the common law or upon common-law principles. It is a special action given by a statute which has no inherent authority or binding force beyond the limits of the State which enacted it. We suppose it to be quite clear if, instead of founding this action upon the statute of West Virginia, it had been instituted and attempted to be maintained upon and by virtue of the statute of this State, to the provisions of which we have referred—the statutes of the two States being essentially dissimilar in their provisions—the action could not have been sustained, unless we were to attempt to give extraterritorial force to our statute, and to make it apply to acts and transactions occurring in other States; and if our statute cannot be so extended and applied, there can be no reason why statutes of other States, not similar in provisions to our own though belonging to the same general class of legislation, should be allowed extraterritorial force and operation by the courts of this State. By the statute of West Virginia the right of action accrues to the personal representative of the deceased, the executor or administrator, and the damages, limited in amount, and hence in the nature of a penalty, are directed "to be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate," whether such parties be wife or children or collateral relations of the deceased, whereas, by our statute the right of action is given directly to the parties who suffer damage by the death of the deceased, namely, the wife, husband, parent, or child, and which action is to be prosecuted in the name of the State for the use of the persons entitled; and the jury are required to apportion the damages assessed.

An administrator or executor appointed in this State receives his power and authority to sue and maintain actions from the laws of this State, and from this State alone. It is according to the laws this State that he must conduct his administration and make distribution. There is no statute of State, nor any principle of law known to our courts, whereby an administrator or executor is given the right to sue and recover in an action like the present, nor is there any law of distribution in force in this State that entitles the next of kin or distributees of a decendent's estate to receive the money recovered in an action like the present; and, if the present administratrix were allowed to maintain the action, it would be exclusively by virtue of a foreign law, and it would only be by force of that law that she could be compelled to account for and to make distribution of the money recovered. There is certainly no comity that requires one State to apply and administer the statute law of another in a case such as the present.

In Rorer on Interestate Law, 144, 145, upon review of the authorities, the author states his conclusion to be that in all purely personal actions, of a

transitory nature, for torts at common law, a citizen of a State may sue a citzen of another State in the courts of such other State, or of any State wherein he may reside, or may be found and served with process, without regard to the place or State in which the injury may have been inflicted, but that where certain acts are made wrongs by statute which were not such theretofore, or where remedies additional to those which existed at common law are provided by statute, advantage can be taken of these new and additional remedies only within the territory or locality in which the statute has force. These constitute new rights, so to speak, and depend for their enforcement, always, upon the statutes by which they are created; and such statutes will be enforced only by the courts of the State wherein they are exacted. In support of these propositions many well considered cases may be cited, as those of Woodard v. Railroad Co., 10 Ohio St. 121; Richardson v. Railroad Co., 98 Mass. 85; Taylor's Admr. v. Pennsylvania Co., 78 Ky. 348; McCarthy v. Railroad Co., 18 Kan. 46; Wills v. Railroad Co., 61 Tex. 432; Buckles v. Eller, 72 Ind. 220. In the case of Taylor's Admr. v. Pennsylvania Co., just refered to, where it was held that an administrator appointed and suing in Kentucky could not maintain an action for the death of his intestate by negligence in Indiana, such action being maintainable by an administrator under the Indiana statute, but not under that of Kentucky, the court of appeals of the latter State said: "A personal representative, as such, has no rights or powers beyond the jurisdiction of the government under whose laws he receives his appointment, and *a priori* he cannot have any rights, nor be subject to any obligations or duties, not imposed by the law of his official domicile. He cannot carry his official character abroad, nor can his official powers and duties at home be affected by foreign laws. A Kentucky administrator suing in a Kentucky court must be able to show that the laws of Kentucky entitle him to the thing sued for. He cannot receive his office from one jurisdiction, and appeal to the laws of another jurisdiction for rights or powers not given by the law which created him." And the same principle is fully sustained in a well-reasoned opinion by the Supreme Court of Ohio in Woodard v. Railroad Co., *supra*.

We are aware that there is some diversity of opinion upon this subject; but we are not aware that there is any well-considered case that holds that the action may be maintained, in a State other than that in which the accident occurred, on the same state of facts, as here presented, and where there existed in the statutes of the two States upon this subject such dissimilarity of provisions as we find to exist in the statutes of West Virginia and Maryland. In Leonard v. Navigation Co., 84 N. Y. 48, it was held that an administrator appointed in the State of New York might maintain an action for the death of his intestate occasioned by a negligent injury inflicted by the defendant in another State, having a statute substantially like the New York statute, allowing an action of damages for death by negligence to be prosecuted by the personal representative of the deceased; and in case of Dennick v. Railroad Co., 103 U. S. 11, brought up from a circuit court sitting in New York, the same rule of decisions is maintained as that laid down in Leonard v. Navigation Co., *supra*. This case in 103 U. S. 11, is much relied on by the plaintiff, but the facts of that case are not similar to the facts of the present case. In that case the death occurred in New Jersey, and the action was brought by an administratrix appointed in New York; and in delivering the opinion the supreme court said "that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and [that] an administrator appointed under the law of that State would be held to have recovered to the same uses, and subject to the remedies, in her fiduciary character which both statute require." The court also said that "the questions growing out of these statutes are new, and many of them unsettled. Each State court will construe its own statute on the subject, and differences are to be expected." It is clear, therefore, that the decision in the case reported in 103 U. S. does not apply to this case. But even the qualified decisions of the court of appeals of New York and of the Supreme Court of the United States upon this subject have not met with general approval, and have not been generally followed by subsequent State court decisions. In the recent case of Davis v. Railroad Co., 143 Mass. 301, 9 N. E. Rep. 815, it was held by the Supreme Court of Massachusetts that an action by an administrator could not be maintained in that State for the death of a person caused by the negligence of the defendant in another State, the remedies provided in the two States not being alike, and the court expressly declined to depart from its own previous decision in Richardson v. Railroad Co., 98 Mass. 85, and follow the general doctrine laid down in Dennick v. Railroad Co., 103 U. S. 11. And so in case of Vawter v. Railroad Co., 84 Mo. 679, where it was held by the Supreme Court of Missouri that an administrator appointed in that State could not maintain an action there for the death of his intestate by negligence of the defendant in Kansas; such action being allowed by the statute of Kansas, but not by that of Missouri. There, also, the case of Dennick v. Railroad Co., and Leonard v. Navigation Co., *supra*, were pressed upon the court for the general doctrine there laid down; but the Supreme Court of Missouri declined to adopt or follow those cases, and decided in accordance with what was taken to be the well-established general principle of interstate law in such cases. And even in New York, in the recent case of Debvoise v. Railroad Co., 98 N. Y. 377, it was held that an action by an administrator for damages for the death of his intestate, caused by the negligence of the defendant in another State, could not be maintained in the courts of New York without proof of the existence of a like statute to that of New York in the State where the accident occurred; thus showing that the right of action given by statute for the death of an individual is not transitory, like the common-law right of action for personal injuries, but the operation and force of such statute must be confined to the State enacting it, except where it can be extended by comity. And whether an action would be sustained by the courts of this State for the death of a person occurring in another State, having a statute of the same or like provisions as our own, is a question not presented in this case, and in regard to which we express no opinion.

The plaintiff having entirely failed to show any such state of case or cause of action as would entitle her to recover in a Maryland court, there was no error in taking the case from the jury, and therefore the judgment must be affirmed.

MUNICIPAL CORPORATION—CONSTITUTIONAL LAW — ORDINANCE — POLICE POWER. — A question of constitutional law of considerable

interest arose in the case of Town of Summerville v. Pressley, 11 S. E. Rep. 545, decided by the Supreme Court of South Carolina. There it was held that an ordinance limiting the maximum quantity of land which it should be lawful for any person or family to cultivate within the corporate limits of the town is valid under a charter which gives the town authorities power to pass any ordinance they may deem necessary for the preservation of the health, good order, etc., of the town. Such an ordinance, imposing a proper and reasonable restriction upon the enjoyment of property in order to prevent it from becoming injurious to public health, is a legal exercise of the police power of the State, which it is competent for the legislature to delegate by charter to the municipal authorities. Nor is it in conflict with Const. S. C. art. 1, § 12, providing that no person shall be subjected in law to any other restraint in regard to personal rights than such as are laid on others in like circumstances. The limit imposed being the same for all, it is not unequal in its operation, though some have more land than others. McGowan, J., says:

The second exception makes the objection that the legislature has not conferred, and could not confer, on the town council, any authority to prevent the usual, proper use of cleared lands by the owner without full compensation paid to him. The State, through the law-making body, certainly possesses the police power, which from its very nature has no well defined limits, but must be as extensive as the necessities which call for its exercise. Judge Dillon describes it thus: "Every citizen holds his property subject to the proper exercise of this [police] power, either by the legislature directly, or by public corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled, 'police laws or regulations;' and it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen own his property absolutely, it cannot be taken from him for any private use whatever without his consent, not for any public use without compensation. Still he owns it subject to this restriction, namely, that it must be so used as not to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that shall not prove pernicious to his neighbors, or the citizens generally. These regulations rest upon the maxim, *salus populi suprema est lex*. This power to restrain a private injurious use of property is very different from the right of eminent domain. It is not a taking of private property for public use," etc. 1 Dill. Mun. Corp. (3d ed.) § 141. In the great leading case upon the subject of Com. v. Alger, 7 Cush. 85, Chief Justice Shaw said; "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legisature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain—the right of a government to take and appropriate private property to public use whenever the public exigency requires it—which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power—the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or to prescribe limits to its exercise," etc. It would seem that these authorities are conclusive of the right of the State, in the exercise of the police power, to make the restriction complained of. If the legislature itself had passed the ordiance just as it stands, it could not, as we think, be doubted that it was a constitutional exercise of the police power. It is said, however, that it was a mistake to suppose that the cultivation of the soil in certain crops was dangerous to health, and therefore the restriction was not a "proper" one. We suppose that the cultivation inhibited must have been considered dangerous to health in the locality of Summerville. But, be that as it may, it was a question for the law-making body. "The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power." Cooley, Const. Lim. 201.

Assuming that the legislature had the power to pass the Summerville ordinance, there can be no doubt that it had the right to delegate that power to the municipal authorities of Summerville as the governmental agent of the State within the corporate limits of the town. "The preservation of the public health and safety is often made a matter of municipal duty; and it is competent for the legislature to delegate to municipalities the power to regulate, restrain, and even suppress particular branches of business, if deemed necessary for the public good." See 1 Dill. Mun. Corp. (3d ed.) § 144; and Harrison v. Baltimore, 1 Gill. 264. The charter of the town of Summerville has the following: "Sec. 5. And the said intendant and wardens shall have full power, under their corporate seal, to make such rules, by-laws, and ordinances respecting the roads, streets, markets, public spring, and police of said village as shall appear to them necessary and requisite for the security, welfare, and convenience of said village, or for preserving health, peace, order, and good government within the same," etc. This provision was adopted from the charter of the town of Newberry, and seems to be as full and comprehensive as municipal charters generally are. We think that the legislature intended to give to the city council of Summerville all the police powers it

possessed, to be exercised within the corporate limits of the town. As was said by the court in the case of Harrison v. Baltimore, *supra:* By its charter the city Baltimore was vested with full power and authority to make all ordinances " 'necessary to preserve the health of the city.' * * * The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish within the specified territorial limits the objects enumerated, the corporate authorities were clothed with all the legislative powers which the general assembly could have exerted. Of the degree of necessity for such municipal legislation the mayor and city council of Baltimore were the exclusive judges. To their sound discretion was committed the selection of the means and manner contributory to the end of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made the guardians," etc. 1 Dill. Mun. Corp. § 144; City Council v. Baptist Church, 4 Strob. 310; Copes v. City of Charleston, 10 Rich. Law, 502.

The third exception complains that the ordinance is "unequal and unjust in that it permits the owner of one-fourth or one-half of one acre of land to cultivate one-fourth or one-half of his possessions, and denies the owner of six acres the right to cultivate more than one forty-ninth of his lands." The second clause of the ordinance declares what shall be the maximum quantity of land it shall be lawful for any family to cultivate in ordinary agricultural crops. Section 12, art. 1, of our constitution declares that "no persons * * * shall be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances." And the fourteenth amendment to the constitution of the United States provides, among other things, that "no State shall * * * deny to any person within its jurisdiction the equal protection of the laws," etc. Under these provisions, one or both, it is contended that the section of the ordinance which fixes a maximum of soil to be cultivated is unconstitutional—being, as alleged, "unequal and unjust"—in that the maximum allowed is the same for all citizens, without regard to their "possessions," respectively. The intent of the ordinance was to limit to a certain point the cultivation of certain crops; and, as it seems to us, the question of "equality" should be determined, not by the number of acres a citizen may happen to own, but by the limit imposed, which, it is admitted, is precisely the same upon all. It is manifest that the object was, not to impose a burden on the citizens in the nature of a tax, which, of course, would have to be levied in proportion to property, but to limit the cultivation of the soil with a view to the preservation of the health of the town. A restriction only according to the quantity of land owned, as suggested would, certainly have failed in accomplishing the purpose in view, and possibly might have been obnoxious to the very objection made here, as creating a distinction among citizens dependent upon the amount of lands owned by them, respectively. Although the citizens may own lands within the corporate limits in different amounts, some more and some less, yet in that regard we are obliged to consider that they are all "under like circumstances;" and the amount of soil allowed to be cultivated in particular crops being the same to all, we cannot hold that this section of the ordinance is unconstitutional on the ground of "inequality" in its provisions.

CARRIERS OF PASSENGERS — EJECTION — TICKETS—CONDITIONS.—In Edwards v. Lake Shore & M. S. Ry. Co., 45 N. W. Rep. 827, decided by the Supreme Court of Michigan, plaintiff purchased a return ticket from Lansing to Chicago, sold at a reduced rate on condition—printed on the face of the ticket and signed by plaintiff—that it should not be good for return passage unless stamped by the company's ticket agent in Chicago and there signed again by plaintiff as the original purchaser. Plaintiff failed to have the ticket stamped or to sign it in Chicago, and refusing to pay his fare on the return trip was ejected from the train. It was held that having failed to comply with the reasonable conditions of the contract, he could not ride on it nor recover for his ejectment. Champlin, J., says:

It is claimed by counsel for plaintiff that the condition requiring the ticket to be stamped at Chicago was an immaterial condition, so long as the plaintiff had, to the certain knowledge of the conductor, taken passage at Chicago; that plaintiff was in a situation to, and offered to, identify himself as the proper person—as the purchaser of the ticket; that the question of identity was, by the ticket itself, to be finally decided by the conductor; that the peculiar circumstances, including the terms of the ticket contract, distinguished this case from all those cases in which the reasonableness of conditions in tickets, limiting the use of them, have been passed upon by the courts. These distinctions are pointed out by counsel for plaintiff as follows: "First. But one question arose, or could possibly have arisen, concerning his right to ride upon the ticket. That question, addressed to the conductor was: 'Is this man who presents this ticket to me the person who bought it and owns it, and is entitled to ride upon it?' Second. That, taking the condition, or all the conditions, of the ticket together, they give to the conductor the right and power to pass finally upon this question; to answer it for the company; to determine the fact. Third. This power or right, being one provided in the contract itself, and for the benefit of the company, and it imposing a duty and obligations upon the passenger which he must discharge upon request to the company, also imposes a duty upon the company, its officers and agents.

Unquestionably, parties capable of contracting may enter into such agreements as they choose; and, if they rest upon a sufficient consideration, and are not void for illegality, nor as being against public policy, they are binding upon them. The contract of carriage in this case, including the conditions, was a valid and binding agreement. The conditions were reasonable, and rested upon a sufficient consideration, namely, the reduced rate of fare. Ordinarily a person going by rail from Lansing to Chicago would be required to purchase a ticket at the point of starting, and upon returning he would be required to purchase a ticket, from the agent in Chicago, from that place to Lansing. Under the conditions of this ticket, he is required to do no more than to call upon the agent there to secure his passage from Chicago to Lansing in accordance with the conditions. There is nothing unreasonable or

annoying in this requirement. The trouble to the passenger is no more than would ordinarily occur, except the signing of his name, and if required, to identify himself, which he has received the consideration for in the reduced rate of fare. His contract with the company was that they would transport him from Chicago to Lansing upon condition that he would present his ticket to the agent at Chicago, sign his name in compliance with the contract upon the back of the ticket, and have it dated and stamped upon the back by the ticket agent. This part of his contract he did not comply with. It was a condition precedent to his right to be carried from Chicago to Lansing upon that ticket. The unstamped ticket gave him no right to a return passage; and, he absolutely refusing to pay his fare, there was no contract in force between the plaintiff and defendant company to carry him upon its cars. Under such circumstances, they had a right to eject him from its cars. The company had broken no contract, and were not in fault, but were ready to fulfill their contract according to its terms and conditions. This being so, it is difficult to see how their ejecting him from the cars, where he had no right to be, can be treated as a tort; they having used no more force then was necessary to accomplish the purpose. To hold them liable would be to hold them responsible to plaintiff for the consequences of his own neglect and failure to comply with the contract upon his part. This would be neither reasonable nor just. The distinctions which the plaintiff's counsel seeks to make, above stated, are not warranted by the contract. The plaintiff's right to ride on that ticket from Chicago to Lansing did not depend upon his being the identical person who purchased the ticket, but upon his compliance with the condition precedent of having it stamped and dated, signing his name. He is not entitled to ride upon it on its return unless this condition is complied with; and no power or authority is given to the conductor to finally determine whether he has a right to a passage upon that ticket unless it is stamped, etc., in accordance with the contract. Neither could the conductor be called upon to enter upon an investigation of the identity of the plaintiff. This position is well answered by Mr. Justice Gray in the similar case of Mosher v. Railroad Co., 127 U. S. at page 396, 8 Sup. Ct. Rep. 1324. He says: "The conductor of the defendant's train, upon the plaintiff's presenting a ticket bearing no stamp of the agent at Hot Springs, had no authority to waive any condition of the contract, to dispense with the want of such stamp, to inquire into the previous circumstances, or to permit him to travel on the train. It would be inconsistent alike with the express terms of the contract of the parties, and with the proper performance of the duties of the conductor in examining tickets of other passengers, and in conducting his train with due regard to speed and safety, that he should undertake to determine, from oral statements of the passenger or other evidence, facts alleged to have taken place before the beginning of the return trip, and as to which the contract on the face of the ticket made the stamp of the agent of Hot Springs Railroad Company at Hot Springs the only and conclusive proof." See also the late case of Boylan v. R. Co., 10 S. C. Rep. 50. The authorities are uniform that, under a contract like the one in question here, there is no liability, either in tort or upon contract, where the plaintiff has failed to comply with the condition precedent stated above.

SUCCESSION AND DISTRIBUTION.

1. Introduction.
2. Succession.
   - *a.* Movable Property.
   - *b.* Immovable Property.
   - *c.* Capacity to Take.
     - (1.) Devises to Corporations.
     - (2.) Devises for Charitable Purposes.
     - (3.) Capacity of Aliens to Inherit.
3. Distributions.

1. *Introduction.*— It is the purpose of this article merely to give an outline of those principles of law which relate to the succession and distribution of property as between the different States of the Union and foreign nations. Those who are curious as to the early history of the question of the succession to property and testamentary disposition thereof, will be inserted in Bentham's chapter on "Succession."[1] Prof. Maine's chapters on "The Early History of Testamentary Succession," and "Ancient and Modern Ideas Respecting Wills and Succession,"[2] and Morgan's chapter on "The Three Rules of Inheritance."[3] Those who are interested in the modern theories of the right of property and hereditary patrimony, to say nothing of the wild speculations and unpracticable theories of Henry George, Dennis Kerney, and others of that ilk, can consult with profit Herbert Spencer,[4] M. Huet,[5] M. C. Baron de Calins,[6] M. Agathon de Potter,[7] Gerr Fritche,[8] Prof. Zachariae'[9] Herr Krause,[10] and Prof. A. H. Ahrens.[11]

2. *Succession—a. Movable Property.*— It is now the universal rule recognized by the common law that the succession of personal property is governed exclusively by the law of the place where the testator was domiciled at the time of his death.[12] The *lex domicilei*

[1] 1 Bentham's Works, 334.
[2] Maine's Ancient Law, chs. VI., VII., pp. 166-237.
[3] Morgan's Ancient Society, pp. 523-554.
[4] Social Statistics, ch. IX.
[5] C. Regne Social du Christianisme, B. III., ch. V.
[6] L'Economie Politique Sources des Revolutions, *passims.*
[7] Economic Sociale (1874), *ad passim;* and Revue de la Philosopic de C'areuir (1876), *passim.*
[8] Der geshlorrene Handelstaat, B. I., K. I., §§ 399, 402; *Id.* K. 7, § 446.
[9] Buchern Vom Staat, *passim.*
[10] System der Rechtphilosophie, Kearusgg von Karl Roder (1874), *passim.*
[11] Naturrecht, *passim.*
[12] See Lawrence v. Kittredge, 21 Conn. 577, 56 Am. Dec. 385; Stolcomb v. Phelps, 16 Conn. 127; Thomas' Succession, 35 La. Ann. 19; Suarez v. Mayor, etc. of New York, 2 Sandf. Ch. (N. Y.) 173; Stolmes v. Rem-

fixes the right of decent of personalty.[13] But it is said that the validity of a gift *causa mostis* is to be determined by the law of the place where it is made, without reference to the donor's domicile.[14] And where while a husband and wife were domiciled in Minnesota, the wife inherited property from her father in Norway, which, in the form of money, was transmitted to this country, it was held, that the rights of the husband and wife in respect to such property were determined by the laws of Minnesota, and not by those of Norway.[15] The right of succession to a decedent's personal property is governed by the law of the domicile, and therefore, where a testator domiciled in Louisiana left two children, a daughter residing in New York, and a son who had been absent and unheard from for twelve years, and the daughter's husband obtained administration in New York, and procured a decree of the probate court of Louisiana declaring his wife the sole heir, such decree was held to be a bar to the rights of the son, who subsequently appeared and claimed his share of the estate.[16] H, born in Connecticut, went to Europe in 1869, to acquire the German language and complete his professional studies. In 1872 he went to Paris, where he remained; and in Feb. 1877, there married a French woman, without any contract as to property. Immediately after he rented a house at Suresnes, near Paris, for two years, and took up his residence there with his wife. In May, 1878, he was brought to this country and sent to a hospital for the insane at Philadelphia, where he died in 1881. The court held that his personal property became subject to the community law of France, and that his widow was entitled to one-half thereof, notwithstanding that by his will, made before the marriage, he had bequeathed the whole of it to others.[17] The succession to personal property is governed by the law of the actual domicile of the intestate at the time of his death,[18] no matter what was the country of his birth or his former domicile, or the actual *situs* of the property at the time of his death.[19] Accordingly, one dying in the State of Sonora, Mexico, leaving neither issue nor a father, his mother would succeed to the whole estate, to the exclusion of his brothers and sisters.[20] The courts of one State have no jurisdiction over the assets of a decedent, within the latter's domicile in another State.[21] And it has been held in Pennsylvania that the courts of a State have no jurisdiction to grant administration, for the purpose of recovering from the resident agent of a foreign executor a fund not collected within the jurisdiction.[22] Where a person dies abroad, being domiciled there, and the courts thereof, under the local law, have adjudicated upon the rights of his

sen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; 20 Johns. (N. Y.) 229, 9 Am. Dec. 269; Parsons v. Lyman, 20 N. Y. 103, 28 Barb. (N. Y.) 564, reversing 4 Bradf. (N. Y.) 268; Graham v. Public Admr., 4 Bradf. (N. Y.) 127, Law Rep. 386; Public Admr. v. Hughes, 1 Bradf. (N. Y.) 125; Burr v. Sherwood, 3 Bradf (N. Y.) 85; Mercure's Estate, 1 Tuck (N. Y.) 288; Guier v. O'Daniel, 11 Binn. (Pa.) 349, *n.*; DeSobrey v. DeLaistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 533; Goodwin v. Jones, 3 Mass. 514, 517, 3 Am. Dec. 173; Blake v. Williams, 6 Pick. (Mass.) 286, 314, 17 Am. Dec. 372; French v. Hall, 9 N. H. 137, 32 Am. Dec. 341; Oliver v. Towner, 14 Martin (La.), 99; Shultz v. Pulver, 3 Paige Ch. (N. Y.) 182; DeCouche v. Savaties, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478; Harvey v. Richards, 1 Mason C. C. 418; Ennis v. Smith, 14 How. (U. S.) 400; Pisson v. Pisson, Ambl. 25; Thorne v. Watkins, 2 Ves. 35; Sill v. Worswick, 1 H. Black, 690, 691; Bruce v. Bruce, 2 Bos. & Pull, 229, *n.*; Hunter v. Potk, 4 T. & R. 182; Potter v. Brown, 5 East, 130; Birtwhistle v. Vardill, 5 Barn. & Cres. 438, 445, 450, 9 Bligh. 32-88, 2 Clark & Finn. 571; Enobin v. Wylie, 10 H. L. Cas. 1; Crispin v. Doglioni, 9 Jur. (N. S.) 653; affirmed L. R. 1 H. L. 304; Partington v. Attorney-General, L. R. 4 H. L. 104; Yates v. Thomson, 3 Clark & Fin. 554; Thornton v. Curling, 8 Sim. 310; Price v. Dewhurst, 8 Sim. 279, 599; Moore v. Budd, 4 Hagg. Ecc. 346, 352; Preston v. Melville, 8 Clark & Finn. 1, 12; *In re* Ewing, 1 Tyrw. 91, 1 Rose, Bank. Carr. 478; 5 Barn. & Cres. 451, 452; Philips v. Hunter, 2 H. Black. 402, 405. But this rule, it would seem, does not prevail in France. At least Sterne says that under *droits 'd aubaine* (the right of escheat) all the effects of strangers (Swiss and Scots excepted) lying in France are seized and confiscated to the government, although the heir be on the spot. See Sterne's "Sentimental Journey," 11, and note.

[13] Grote v. Pace, 71 Ga. 231. By the law of domicile, as applied to succession, is meant, not the general law, but the law which the country of the domicile applies to the particular case. Dupuy v. Wurtz, 53 N. Y. 556.

[14] Emery v. Clough, 63 N. H. 552.

[15] Muus v. Muus, 29 Minn. 115.

[16] Sherwood v. Wooster, 11 Paige Ch. (N. Y.) 441.

[17] Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17.

[18] It has been said that this qualification "at the time of his death" is important, because any change made after the death of the testator will not effect the succession. Lynch v. The Government of Paraguay, 25 L. T. (N. S.) 164.

[19] Russell v. Madden, 95 Ill. 485.

[20] Russell v. Madden, *supra*.

[21] Watt's Appeal, 31 Leg. Int. 182, 8 Phila. (Pa.) 217; Vandyke's Estate, 32 Leg. Int. 29, 1 Weekly Notes of Cases, 171.

[22] Schley's Estate, 33 Leg. Int. 202, 2 Weekly Notes of Cases, 684.

heirs, and the courts of other countries will be bound thereby in disposing of property within their jurisdiction.[23] In ascertaining who is entitled to take as heirs or distributees the law of the domicile governs. Thus, in determining whether primogeniture gives a right to preference and an exclusive succession; whether a person is legitimate or not and able to take succession; whether his heirs are to take *per capita* or *per stripes;* and the nature and extent of the representations.[24]

b. Immovable Property.—The decent and distribution of real estate is governed exclusively by the *lex loci rei sitae.*[25] Thus the descent of real estate in Alabama, owned by a person who dies intestate in New York, where he resided, is governed by the laws of Alabama.[26] A testator domiciled in California died possessed of land and personalty there and in New Jersey. It was held that the community law prevailing in California would not apply to the lands in New Jersey.[27] If a person dies intestate and childless out of the State of Florida, leaving lands there, his widow is his sole heir to such lands under the Florida statute of 1872, which declares that where the husband dies intestate without children, the wife shall be sole heir at law.[28] And the rights of inheritance of a child adopted in Wisconsin, as to real estate in Illinois, the owner whereof was a resident of Illinois, must be determined by the laws of Illinois.[29] In the interpretation of wills disposing of movable property, the persons who are to take are described by some general designation, such as "next of kin," "issue" "children," or "heirs" and the like; the rule of common law is that persons who are to take are to be ascertained by the *lex domicilei*; and this is true whether the will be of movable or immovable property, unless the context clearly shows a different intention on the part of the testator.[30] Where a man domiciled in one State executes a will there in which he disposes of personal property in the State of his domicile, and also in another State, which renders it necessary to have administrations in both States after the assets within the latter State have been collected, they should be remitted to the court of the State of the domicile for distribution.[31] It has been said "where land and personal property are situated in different countries, and governed by different laws, the question arises upon the combined effect of those laws. It is often very difficult to determine what portion of each law is to enter into the decision of the question. It is not easy to say how much is to be considered as depending on the law of real property, which must be taken from the country where the land lies, and how much on the law of personal property, which must be taken from the law of the domicil, and to blend both together so as to form a rule applicable to the mixed question which any other law separately furnishes sufficient material to decide."[32] The question whether a person died intestate or not, must be determined by the law of the place where he was domiciled at the time of his death.[33] F, died in Connecticut leaving

[23] Doglioni v. Crispin, L. R. 1 H. L. 301, Prob. & Mat. 41; *In re* Weaver, 36 L. J.

[24] Akston v. Akston, 15 La. Ann. 138; Jennison v. Hapgood, 10 Pick. (Mass.) 77, 79; Coster v. Sapte, 1 Curt. Ecc. 691; Attorney-General v. Dunn, 6 Mees. & W. 511; De Bonneral v. De Bonneral, 1 Curt. Ecc. 856.

[25] Cutter v. Davenport, 1 Pick. (Mass.) 81, 11 Am. Dec. 149; Hosford v. Nicholes, 1 Paige Ch. (N. Y.) 220; Wills v. Cowper, 2 Ohio, 124; Harper v. Hampton, 1 Har. & J. (Md.) 687; Goodwin v. Jones, 3 Mass. 514, 518; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581, 20 Johns. (N. Y.) 254, 49 Am. Dec. 269; Nicholson v. Leavitt, 4 Sandf. (N. Y.) 276; Andrews v. Herriot, 4 Cow. (N. Y.) 510, 527; Blake v. Williams, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; Milne v. Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466; Augusta Ins. Co. v. Morton. 3 La. Ann. 17; Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627, 630, 31 Am. Dec. 264, United States v. Crosby, 7 Cranch (U. S.), 115; Clarke v. Graham, 6 Wheat. (U. S.) 577; Kerr v. Moon, 9 Wheat. (U. S.) 565; McCormick v. Sullivant, 10 Wheat. (U. S.) 192; Darby v. Mayor, 10 Wheat. (U. S.) 465; Sill v. Worswick, 1 H. Black, 665; Hunter v. Potts, 4 T. R. 182; Philip v. Hunter, 2 H. Black, 402; Selkirg v. Davis, 2 Rose Bank. Cass. 291, 2 Dow. 230; Copin v. Copin, 2 P. Wm. 290, 293; Brodie v. Barry, 2 Ves. & B. 130; Birtwhistle v. Vardill, 5 Barn. & Cres. 438; Curtis v. Fulton, 14 Ves. 537, 541; Elliott v. Minto, 6 Madd. 15; Cockerell v. Dickens, 3 Moore P. C. 98, 131, 132; Tullock v. Fartley, 1 Young & C. (N. R.) 114; Bunburg v. Bunburg, 3 Jur. (Eng. 1839) 644.

[26] Grimball v. Patton, 70 Ala. 626.

[27] Pratt v. Douglas, 38 N. J. Eq. 516.

[28] Crolly v. Clark, 20 Fla. 849.

[29] Keegan v. Geraghty, 101 Ill. 26.

[30] Browne v. Browne, 3 Hagg. Ecc. 455, note, 4 Wil. & S. H. 28; Elliott v. Minto, 6 Madd. 16; Winchelsea v. Garrety, 2 Keen, 263, 309, 310.

[31] Parsons v. Lyman, 20 N. Y. 103.

[32] Brodie v. Barry, 2 Ves. & B. 130, 131. See also Balfour v. Scott, 6 Bro. P. C. 601; Drummond v. Drummond, 6 Bro. P. 601; Robertson on Succ. 202-207; Comm. on Col. & For. L. pt. 2, ch. 15, § 4, p. 731.

[33] Moultrie v. Hunt, 23 N. Y. 394, reversing s. c., 26 Barb. (N. Y.) 252; 3 Bradf. (N. Y.) 322; Isham v. Gibbons, 1 Bradf, (N. Y.) 69.

a will attested by only two witnesses. The probate court granted administration on her estate, finding in the order that she was there domiciled and died intestate. Afterwards on citation of all parties interested, the executors named had the will proved in New York (where it was valid). The New York Supreme Court finding that F was domiciled in New York at the time of her death, it was held that this was conclusive on all persons who were parties to the proceeding, as to her domicil; and it was the duty of the Connecticut probate court, on application of the executors, to admit the will to probate for ancillary administration.[34]

c. Capacity to Take.—The question of the capacity of parties entitled to inherit, either in case of testacy or intestacy, is governed, so far as concerns movables, by the law of the last domicile of the deceased.[35] The law of the State in which was one's property and domicile at the time of his death governs as to the nature and *quantum* of his heir's interest;[36] and this law is to determine whether a legacy is adeemed by the death of the legatee during the testator's life-time,[37] and it is also to determine the husband's and wife's distributive interest.[38] Thus, where by the law of the parent's last domicile, natural children are entitled to succeed, this will be binding in countries where only children born in wedlock have this right.[39]

1. *Devises to Corporations.*—A corporation created by the laws of one State for educational purposes, with the power to acquire and hold real estate, is capable of taking by devise lands in another State.[40] A bequest by a citizen of Connecticut to an unincorporated association in New York will be declared void by the New York courts if void under the New York law, although valid under the Connecticut law.[41] It has been said that although a New York corporation might be unable to take a legacy under a will executed within two months of the death of the testator, a corporation created under the law of New Jersey, under a law which contains no such provisions, may take under such a will executed in New York.[42] And under the statutory provisions of New York[43] that "no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute to take by devise," a foreign corporation cannot take without assistance from the legislation of the State, whatever the provisions of its own charter. If, however, the will directs the land to be sold, and the proceeds given to the corporations, it seems the gift is valid.[44] But where a bequest is made to a foreign corporation authorized to receive the same, questions relating to the validity of the terms of the bequest, and as to investment and accumulations, must be decided by the courts of the foreign State.[45] It has been said that the business capacity of a successor is in general to be determined by the law of his domicile at the time of the devolution of the estate.[46] A successor upon whom rests no incapacity in his domicile, may yet be deemed incapable by the *lex fori*, owing to the effect of the laws based upon public policy.[47]

2. *Devises for Charitable Purposes.*—It has been said by the Supreme Court of the United States, that the law of the testator's domicile is to govern as to the validity or invalidity of devises for charitable purposes.[48] Thus it is held that the validity of a charitable bequest is to be determined by the laws of the State where the fund is to be administered.[49] Where a testator domiciled in one country

[34] Willet's Appeal, 50 Conn. 330.

[35] Dannelli v. Dannelli, 4 Bush (Ky.), 51.

[36] King v. Martin, 67 Ala. 177; Browne v. Browne, Wils. & Sh. 281.

[37] Thornton v. Curling, 8 Sim. 310; Anstruther v. Chalmer, 2 Sim. 1.

[38] Slaughter v. Garland, 40 Miss. 172; Cameron v. Watson, 40 Miss. 191.

[39] Enokin v. Wylie, 10 H. L. Cas. 1; Doglioni v. Crispin, L. R. 1 H. L. 301. See also Boyes v. Bedale, 12 Week. Rep. 232, 1 Hem. & N. 798; Goodman v. Goodman, 3 Giff. 643; Skottowe v. Young, L. R. 11 Eq. 4.

[40] Saint Clara Female Academy v. Sullivan, 116 Ill. 375.

[41] Mapes v. American Home Missionary Society, 33 Hun (N. Y.), 360.

[42] Riley v. Diggs, 2 Dem. (N. Y.) 184.

[43] 2 Rev. Stat. p. 57, § 3.

[44] Draper v. President, etc. of Harvard College, 57 How. (N. Y.) Pr. 269.

[45] *Idem.*

[46] Hill v. Townsend, 24 Tex. 575.

[47] Harper v. Stanbrough, 2 La. Ann. 377; Harper v. Lee, 2 La. Ann. 382. See McIntosh v. Townsend, 16 Ves. 330; Attorney-General v. Mill, 3 Russ. Ch. 328, 5 Bligh, 593.

[48] Jones v. Habersham, 107 U. S. 174, 27 L. ed. 401. Thus the validity of a charitable devise as against the heir at law, depends upon the law of the State where the land lies. Jones v. Habersham, *supra.*

[49] Manice v. Manice, 43 N. Y. 303, 1 Lans. (N. Y.) 348; Chamberlain v. Chamberlain, 43 N. Y. 424, 3 Lans. (N. Y.) 348; Kennedy v. Palmer, 1 S. C. 581.

provides for the sale of his land in that country, and the application of the proceeds to charity in another country, the question of the validity of such will is to be determined by the law of the country where it is to be applied to charity.[50] Where the law of the testator's domicile prohibits devises for charitable purposes, this law will be held to apply to a devise to a foreign charity, although such devise may be good if made in the country where the charity exists.[51] A statute of New York provides that "no person having a husband, wife, child, or parent shall, by his will, bequeath to any charitable corporation more than one-half of his estate, after the payment of his debts; such bequest to be made valid to the extent of one-half and no more." It has been held that this statute does not affect a bequest made by a testator domiciled in Connecticut where the bequest is valid, to a charitable corporation located in the State of New York.[52]

3. *Capacity of Aliens to Inherit* —According to the common law as it prevails in the United States, aliens are competent to take land by deed or devise, and hold the same as against any one except the sovereign until "office found;"[53] and this is held to be the case notwithstanding a local statute making such right dependent on a license from the State.[54] In Kentucky, while aliens generally cannot inherit land, an alien friend residing in that State for two years is entitled, after that period, to receive and pass title to lands.[55] In Iowa a non-resident alien can take by succession, provided he makes his residence in the State.[56]

3. *Distribution*.—The distribution of personal property is regulated by the law of the owner's domicile, not by the *lex loci rei sitae*.[57]

[50] Philadelphia Baptist Association v. Smith, 3 Pet. (U. S.) Appx 501-503; Curtis v. Hutton, 14 Ves. 337, 541.

[51] Philadelphia Baptist Association v. Smith, *supra*; Curtis v. Hutton, *supra*.

[52] Crum v. Bliss, 47 Conn. 592.

[53] See De Werle v. Mathews, 26 Cal. 455; Sewall v. Lee, 9 Mass. 363; Guier v. Smith, 22 Md. 239; Taylor v. Benham, 5 How. U. S. 233; Jones v. McMaster, 20 How. (61 U. S.) 19, 15 L. ed. 805; Cross v. Devalle, 1 Wall. (68 U. S.) 5, 17 L. ed. 515; Craig v. Radford, 3 Wheat. (U. S.) 594.

[54] Cross v. DeValle, 1 Wall. (61 U. S.) 5, 17 L. ed. 805.

[55] Yaker v. Yaker, 4 Metc. (Ky.) 33.

[56] See Krogan v. Kinney, 15 Iowa, 242; Purczell v. Smidt, 21 Iowa, 540; Greenhold v. Stanferth, 21 Iowa, 695; Robin v. Robin, 3 Iowa, 45.

[57] Hutton's Exrs. v. Hutton (N. J.), 2 Cent. Rep. 216; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; Vroom v. Van Horne, 10 Paige Ch. (N. Y.) 549; Mills v. Fogal, 4 Edw. Ch. (N. Y.) 559; Suarez v. New York, 2 Sandf. Ch. (N. Y.) 73, 42 Am. Dec. 94; Parsons v. Lyman, 20 N. Y. 103, 28 Barb. (N. Y.) 564, reversing s. c., 4 Bradf. (N. Y.) 268; Graham v. Public Administrator, 4 Bradf. (N. Y.) 127, 19 Law Rep. 386; Public Administrator v. Hughes, 1 Bradf. (N. Y.) 125; Burr v. Sherwood, 3 Bradf. (N. Y.) 85; Mercure's Estate, 1 Tuck. (N. Y.) 288; Apple's Estate, 66 Cal. 432; Banbichon's Estate, Myrick's Probate (Cal.), 55; Varnum v. Camp, 1 Gr. (N. J.) 326, 25 Am. Dec. 476.

In California the rule is recognized that the distribution of a decedent's personalty is governed by the law of the domicile;[58] and the courts will not resort to the laws of a foreign country unless the laws are expressed in and made a part of a marriage contract.[59] But it is held in Pennsylvania that the *lex fori* controls the distribution of a decedent's estate.[60] Notes taken by an agent, resident of Mississippi, for his principal in a foreign country, in the business of loaning money for his principal, are held to be subject to distribution as "personal property situated in this State."[61] And money deposited in Mississippi banks, or notes secured on land there, have been held not within the Mississippi Code of 1880, § 1270, regulating the descent and distribution of personal property situated in that State, if the deposit certificates and books, and the mortgage notes, are found at the foreign domicile of the intestate, who has no creditors, heirs or property in Mississippi, and, pending a contest between the domiciliary administrator and a stranger as to administering in Mississippi, the court of the domicile orders distribution.[62] Debts are to be paid according to their respective dignity, as regulated by the law of the country where the administrator acts, and from which he derives his powers, not by the law of the place where the contract was made,[63] and the courts of another State cannot interfere therewith by injunction.[64] But it seems that the right of priority of payment among creditors

[58] Apple's Estate, 66 Cal. 432.

[59] Banbichon's Estate, Myrick's Probate (Cal.), 55.

[60] Miller's Estate, 3 Rawle (Pa.), 312, 24 Am. Dec. 345; Pleasant's Appeal, 77 Pa. St. 356.

[61] Jahier v. Rascoe, 62 Miss. 699.

[62] Speed v. Kelly, 59 Miss. 47. But see Weaver v. Norwood, 59 Miss. 665.

[63] Union Bank of Georgetown v. Smith, 4 Cranch C. C. 21.

[64] Mead v. Merritt, 2 Paige Ch. (N. Y.) 402; Vroom v. Van Horne, 10 Paige Ch. (N. Y.) 549, 42 Am. Dec. 94; Varnum v. Camp, 1 Gr. (N. J.) 326, 25 Am. Dec. 426.

of an intestate depends on the law of the place where the assets are administered, and not on the law of the place of the contract, or of the domicile of the deceased.[65] A died intestate and insolvent, domiciled in New Jersey, and an administration was taken out in New York, to which State the New Jersey assets were taken. It was held that a judgment creditor, whose claim was a preferred claim under the New Jersey law, should be accorded that *status* in New York to the extent of the New Jersey assets.[66]

[65] Smith v. Union Bank of Georgetown, 5 Pet. (U. S.) 518.

[66] Hardenberg v. Manning, 4 Dem. (N. Y.) 437.

MUNICIPAL CORPORATIONS—PUBLIC BUILDINGS—NEGLIGENCE.

BRIEGEL V. CITY OF PHILADELPHIA.

Supreme Court of Pennsylvania, May 28, 1890.

Municipal Corporations — Negligence — Public Buildings.—A municipal corporation owning and occupying property is as much subject as a private citizen to the usual rule, *sic utere tuo ut alienum non laedas.*

MITCHELL, J.: The first six specifications of error are to the findings of fact and the assessment of damages, but the report of the referee having been confirmed by the court, and no plain mistake being shown, we dismiss them without discussion. But the learned counsel for the city have made an urgent and ingenious effort to bring this case within the ruling in Ford v. School Dist., 121 Pa. St. 543, 15 Atl. Rep. 812. The distinction, however, is plain. That case was an action for negligence of the janitor of a school building, and was decided on the ground that, under the Pennsylvania statute, school-districts are agencies of the commonwealth for a special and limited purpose, with no funds under their control, but public moneys devoted to a specific charity, and not divertible, even indirectly, to any other use. This purpose might be entirely destroyed by holding the funds liable for the consequences of torts by the officers or servants of the school-districts, and therefore such liability cannot be sustained. It had been held as early as Wharton v. School Directors, 42 Pa. St. 358, that school-districts, are not municipalities, but mere territorial divisions for limited purposes, and belonging to the class of *quasi* corporations, which exercise some of the functions of a municipality within a prescribed sphere. To the same effect are Com. v. Beamish, 81 Pa. St. 389; Colvin v. Beaver, 94 Pa. St. 388; School-Dist. v. Fuess, 98 Pa. St. 600. And this is the well-settled general doctrine. "It is essential * * * to bear in mind the distinction * * * between municipal corporations, proper * * * and involuntary *quasi* corporations, such as townships, school-districts * * *. The decisions * * * hold the former class of corporations to a much more extended liability than the latter even where the latter are invested with corporate capacity and with the power of taxation." 2 Dill. Corp. (3d Ed.) §961.

The present action differs from the class we have been considering, in being against the city of Philadelphia, and in being an action for nuisance by the negligent use of property. The city, having a general power of taxation, and exercising full municipal functions, comes under the larger measure of liability spoken of by Judge Dillon. Just how far this liability extends has not been definitely decided, as is said by our Brother Clark, in Boyd v. Insurance Patrol, 113 Pa. St. 269, 279, 6 Atl. Rep. 536, where he reviews the cases with specicial reference to the liabilities of charitable or other corporations exercising a *quasi* municipal functions. Nor is the distinction between the cases where municipal corporations have been held liable and where they have not, entirely logical or obvious, as was observed by Chief Justice Gordon in Ford v. School-Dist., 121 Pa. St. 543, 549, 15 Atl. Rep. 812. But, in the class of cases to which the present belongs, injuries arising from the misuse of land, there has never been any substantial hesitation in holding cities liable. The ownership of property entails certain burdens, one of which is the obligation of care that it shall not injure others in their property or persons, by unlawful use or neglect. This obligation rests, without regard to personal disabilities, on all owners alike, infants, *femes covert*, and others, by virtue of their ownership, and muncipal corporations are not exempt. The general rule is thus stated: "Municipal corporations are liable for the improper management and use of their property, to the same extent and in the same manner as private corporations and natural persons. Unless acting under valid special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another." 2 Dill. Mun. Corp. (3d Ed.) § 985. The particular question here involved does not seem to have been before this court, but it was expressly decided in Shuter v. City, 3 Phila. 228, by Judge Sharswood, when president of the district court. "The municipal corportions owning and occupying property for public purposes is as much subject as a private citizen to the usual rule, *sic utere tuo ut alienum non lædas.* The city is as much bound as an individual owner of a lot to find an outlet for the water on it without encroaching on his neighbor." We adopt this as a correct exposition of the law. Judgment affirmed.

NOTE.—The general rule is well established that a public corporation intrusted by statute with the performance of a public duty, and receiving therefrom no profits or emoluments to itself, is not liable in a

civil action by an individual who has sustained special damage by the neglect of its agents in the performance of such duty. His only remedy is such as may be given by statute.[1] On the other hand such corporations are liable in damages to the injured party for their acts done in what is termed their private or corporate character, and from which they derive some special or immediate advantage or emolument.[2] In the effort to determine what duties are imposed for the exclusive benefit of the public, and what duties are enjoined or powers granted for the special benefit of the public corporation, the courts have arrived at very conflicting conclusions.

Where the corporation is created by law only to accomplish certain functions of government, such as is called a *quasi*-corporation, it is not responsible for the neglect of duties enjoined on it, unless the action is given by statute.[3] The liability of a municipality is said to accrue when the duty enjoined relates to some act in the doing of which the city has some special interest apart from the public generally.[4] Where the public corporation derives some pecuniary benefit from the powers granted, a liability for its negligence has been held to arise by reason thereof. Because a city had control of a public wharf and received tolls from those using it, the city was held liable for injuries sustained by reason of its negligent care of such wharf.[5] Where a corporate body had charge of docks and received the tolls, which were collected only for the maintenance of the work and for the possible future benefit of the public, it was held responsible for damages sustained from the improper performance of its work, and the tolls received were subjected to the claims so arising.[6] Other cases have held municipalities liable for their negligent acts because the grant of special powers to them was a special privilege or immunity granted for the particular local advantage of such municipalities, and placed them on the same footing of liability as if the benefit were in the shape of a rent or toll or other pecuniary income.[7]

In a case, where a most thorough review of the decisions was made, it was said that the result of the English authorities is that, when a duty is imposed upon a municipal corporation for the benefit of the public without any consideration or emolument received by the corporation, it is only where the duty is a new one, and is such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect in its performance is to be presumed. The decisions in this country which hold otherwise (especially those relating to defective highways) are considered to be based on incorrect principles.[8]

Public Property—Negligent use of.—Many authorities maintain that a municipal corporation is as much bound as any private owner to manage and use its property so as not to injure others, and in case of failure so to do is liable to an action for damages.[9] These cases do not note the difference between property obtained and used by a municipality at its own volition, and property which by law it is required to obtain and use for public purposes. In the former case a liability on account of negligence always attaches, while in the latter it is often denied, unless some statute so orders. Where a county undertook to dig a ditch to convey water therein by pipes to a public institution at its own volition, it was held liable for damages sustained by its negligent performance of such work.[10] Where a town was allowed, but not required, to carry on a farm in order to support and keep its poor, it was held liable for injuries inflicted by its live stock which escaped from its premises.[11] In another case it was also held liable for damages caused by fires voluntarily created, which by negligence were allowed to extend to the lands of others.[12] Where a city erected a reservoir, it was held liable for injury to the land of another from seepage.[13] A city is responsible for its mere negligence in the construction of a work authorized by it.[14] Where the property is used under a public duty enjoined by law, liability to a civil action for negligence does not seem to exist unless given by law. Where a city jail was so poorly constructed that, owing to exposure and the inclemency of the weather, a prisoner contracted consumption, he was denied all remedy against the city. In Massachusetts, where a party is injured by any defect or want of repair in a city or town hall or other public building, used solely for political purposes, or by reason of any negligence of the agents of the city in the management of such buildings, there is no right of action. The reason given is that a municipality is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all cities and towns alike, from the performance of which it derives no compensation. Where, however, such corporation is in the habit of renting or leasing such building or a part thereof, it is liable.[15] Where a child attending a public school was injured by reason of the unsafe condition of a staircase therein, the city was not liable.[16] A town hall was improperly constructed; during the annual town meeting the floor of the town hall fell and the plaintiff was injured. His suit against the town was dismissed, because no action lay for the neglect to perform a mere public duty or for its imperfect performance.[17] Where a county was required by law to provide and maintain a court house, and a city succeeded to its rights and liabilities in reference thereto, such city was held not to be liable to a person injured by falling into an open aria, which injury was due to the negligence of the city.[18] It is difficult to reconcile this decision with another made by the same court, wherein the city was held liable for injuries sustained by a person who fell over a trap door leading into a cellar under a police station.[19] The court in the last

[1] Vorrath v. Hoboken, 49 N. J. L. 285; City of Anderson v. East, 117 Ind. 126; Carrington v. City of St. Louis, 89 Mo. 208.

[2] Western S. F. S. v. Philadelphia, 31 Pa. St. 175; Oliver v. Worcester, 102 Mass. 489; Mayor of Helena v. Thompson, 29 Ark. 569.

[3] Cunningham v. City of St. Louis, 96 Mo. 53.

[4] La Clef v. City of Concordia, 41 Kan. 323.

[5] Pittsburgh v. Grier, 22 Pa. St. 54; Buckbee v. Brown, 21 Wend. 110.

[6] Mersey Docks v. Gibbs, 11 H. L. Cas. 686.

[7] Eastman v. Meredith, 36 N. H. 284.

[8] Hill v. Boston, 122 Mass. 344.

[9] Ashley v. City of Port Huron, 35 Mich. 296; Rowland v. Supts. of Poor, 49 Mich. 553; Mackey v. City of Vicksburg, 64 Miss. 774; Eastman v. Meredith, *supra;* Harper v. City of Milwaukee, 30 Wis. 365; Town of Suffolk v. Parker, 79 Va. 660.

[10] Hannon v. County of St. Louis, 62 Mo. 313.

[11] Moulton v. Scarborough, 71 Me. 267.

[12] Rowlands v. Supts. of Poor, 49 Mich. 553.

[13] Wilson v. New Bedford, 108 Mass. 261.

[14] Barnes v. Dist. of Columbia, 91 U. S. 540.

[15] Worden v. City of New Bedford, 131 Mass. 23; Oliver v. Worcester, 102 Mass. 489; Larabee v. Inhabitants of Peabody, 128 Mass. 561.

[16] Hill v. Boston, 122 Mass. 344.

[17] Eastman v. Meredith, *supra.*

[18] Cunningham v. City of St. Louis, 96 Mo. 53.

[19] Carrington v. City of St. Louis, 89 Mo. 208.

decision merely announced the general principle that the rule *sic utere tuo ut alienum non laedas* was applicable to public corporations.

CORRESPONDENCE.

FEES OF NEW YORK LAWYERS.

To the Editor of the Central Law Journal:

Anent, "Fees of New York Lawyers," vol. 31, p. 132, CENT. L. J., it is not surprising that the fees of New York lawyers add up annually to the amounts named, if a case in point is a criterion. A St. Louis lawyer had occasion about a year ago to take a deposition in New York city. He sent to a New York lawyer to have a subpœna issued for a witness to appear before a notary. Such subpœnas in New York have to be issued by a court of record, and not by the notary, as is usual in other States. The New York lawyer to whom the request was sent, being secretary of a large corporation, had not time to get the subpœna issued, and turned the matter over to a law firm, charging $25 for his services in that behalf. The firm made application to the court and had the subpœna issued, charging for such services $50—total for issuing one subpœna in New York city, $75. Cost of the same in St. Louis, two cents for a notary's blank! "Comparisons are odious." W. B.

JETSAM AND FLOTSAM.

THE STAGE LAWYER.—There are two moments in the course of his client's career that the stage lawyer particularly enjoys. The first is when the client comes unexpectedly into a fortune; the second, when he unexpectedly loses it. In the former case, upon learning the good news the stage lawyer at once leaves his business and hurries off to the other end of the kingdom to bear the glad tidings. He arrives at the humble domicile of the beneficiary in question, sends up his card, and is ushered into the front parlor. He enters mysteriously, and sits left; client sits right. An ordinary, common lawyer would come to the point at once, state the matter in a plain business-like way, and trust that he might have the pleasure of representing, etc., but such simple methods are not those of the stage lawyer. He looks at the client and says: "You had a father." The client starts. How on earth did this calm, thin, keen-eyed old man in black know that he had a father? He shuffles and stammers, but the quiet, impenetrable lawyer fixes his cold, glassy eye on him, and he is helpless. Subterfuge he feels, is useless, and amazed, bewildered, at the knowledge of his most private affairs possessed by his strange visitant, he admits the fact: he had a father. The lawyer smiles with a quiet smile of triumph, and scratches his chin. "You had a mother, too, if I am informed correctly," he continues. It is idle attempting to escape this man's supernatural acuteness, and the client owns up to having had a mother also. From this the lawyer goes on to communicate to the client, as a great secret, the whole of his (the client's) history from his cradle upward, and also the history of his nearer relatives, and in less than half an hour from the old man's entrance, or say forty minutes at the outside, the client almost knows what the business is about. On the other occasion, when the client has lost his fortune, the stage lawyer is even still happier. He comes down himself to tell the misfortune (he would not miss the job for worlds), and he takes care to choose the most unpropitious moment for breaking the news. On the eldest daughter's birthday, when there's a big party on, is his favorite time. He comes in about midnight and tells them just as they are going down to supper. He has no idea of business hours, has the stage lawyer—to make the thing as unpleasant as possible seems to be his only anxiety. If he cannot work it for a birthday, then he waits till there's a wedding on, and gets up early in the morning on purpose to run down and spoil the show. To enter among a crowd of happy, joyous fellow-creatures, and leave them utterly crushed and miserable, is the stage lawyer's hobby.—*From "Stage-Land," by Jerome K. Jerome.*

HUMORS OF THE LAW.

"You have no right to send me up as a vagrant," said a lame beggar to a magistrate.

"You have no visible means of support," replied the judge.

"What's the matter with this crutch?"—*Judge.*

"Now, sir, you say you know the plaintiff's reputation, and you know it to be bad?"

"I do."

"Now tell the jury, on your oath, what reasons you have for making such a statement."

"Well, I can say on oath, sir, that I have met this man in places where I would be ashamed to be seen."—*Green Bag.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATOR—Appointment.—An administrator *c. t. a.* was appointed, at the suggestion of an executrix, on her resignation. The bond was, by a clerical error,

conditioned, and letters granted, to administer the estate of the executrix, instead of that of the testator: *Held* that, under Code Ga. § 2505, providing for an administrator's bond, and that a substantial compliance with said section shall be sufficient, it was sufficient to constitute him administrator of testator's estate. —*White. v. Spillers*, Ga., 11 S. E. Rep. 16.

2. ADMIRALTY—Maratime Liens.—Liens for supplies, by the long-prevailing maratime law, take precedence of a lien for damage to cargo, on the same voyage, and similarly to damage arising from negligent towage on the same voyage.—*The Proceeds of The Gratitude*, U. S. D. C. (N. Y.), 42 Fed. Rep. 299.

3. APPEAL—Certiorari.—In replevin, where plaintiff claims under a chattel mortgage, an alleged defect in the form of a certificate made by the township clerk to the copy of the mortgage admitted in evidence cannot be noticed on appeal when the record brought up by *certiorari* fails to show the form of the certificate.—*Rodman v. Clark*, Mich., 45 N. W. Rep. 1001.

4. APPEALABLE ORDER.—An order in part granting, and in part refusing, a motion to transfer certain issues for trial in equity, is appealable.—*Price v. Ætna Ins. Co.*, Iowa, 45 N. W. Rep. 1053.

5. ASSIGNMENT—Rights of Parties.—A person who had assigned and delivered personal property to one who had agreed to pay certain debts from the proceeds of the property assigned his residuary interest in the property to H, and then drew an order on his first assignee, who, before he had notice of the assignment to H, accepted the order as payable out of said proceeds: *Held*, that the holder of the order had a claim on the proceeds of the property prior to that of H.—*Howe v. Short*, Penn., 19 Atl. Rep.1022.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A deed of assignment for benefit of creditors, directing the assignee "to dispose of, for cash or otherwise, as is customary or according as the law directs, or shall be agreed upon by a majority of the said creditors, all of said property," etc., is not void for ambiguity, but will be interpreted to direct the assignee to sell for cash or on time, as is customary in cases of assignments.—*Baum v. Pearce*, Miss., 7 South. Rep. 548.

7. ATTACHMENT—Conversion.—An officer who, under a writ of attachment, has seized property in the hands of third persons to which they assert title by purchase from the debtor, cannot, in an action for its conversion brought before the taking of judgment and issue of execution in the attachment proceeding, attack the purchase by the third persons, as having been made in fraud of the debtor's creditors, without proving the indedtedness on which the attachment issued.—*Trowbridge v. Bullard*, Mich., 45 N. W. Rep. 1012.

8. ATTACHMENT—Damages.—Under Code Iowa, § 2961, providing that, where an attachment has been wrongfully sued out, "the actual damages sustained" thereby may be recovered in an action on the bond, the plaintiff in an attachment cannot be made liable for the failure of the sheriff to exercise reasonable and ordinary care of the property attached.—*Ruthven v. Beckwith*, Iowa, 45 N. W. Rep. 1073.

9. ATTACHMENT—Evidence.—In an action on an attachment bond, the acts of the attached debtors subsequent to the attachment are admissible to show their intentions in regard to their property and creditors at the time the attachment was sued out.—*Mayne v. Council Bluffs Sav. Bank*, Iowa, 45 N. W. Rep. 1057.

10. ATTACHMENT—Pleading.—Plaintiff's affidavit for attachment alleged that the mortgage by which the debt of $700 was secured had become valuless. Defendant's affidavit on motion to dissolve alleged that he was seized and in possession of the mortgaged land; that at the date of the mortgage it was worth $21,000, and was still worth that amount: *Held* that, plaintiff having failed to avail himself of the right, under Code Civil Proc. Cal. § 557, to contradict defendant's statement of facts, or to state other facts, defendant's affidavit was conclusive that plaintiff had no right of attachment, on the ground that the "security had become valuless," under section 588.—*Barbieri v. Ramalli*, Cal., 24 Pac. Rep. 113.

11. ATTACHMENT—Service of Process.—Where the officer serving a summons and attachment is unable to find defendant, and fails to leave copies at defendant's last place of residence, as required by How. St. Mich. §§ 6827, 6441, respectively, or to return that there was no such last place of residence in the country, the justice before whom the action is brought does not acquire jurisdiction.—*Segar v. Muskegon Shingle & Lumber Co.*—Mich., 45 N. w. Rep. 982.

12. ATTORNEY AND CLIENT—Fees.—In an action by an attorney for professional services, the questions whether he was retained by the defendant, and, if so, what services he rendered, and what they are reasonably worth, are all questions of fact.—*Playford v. Hutchinson*, Penn., 19 Atl. Rep. 1019.

13. ATTORNEY AND CLIENT—Trial.—Where an attorney filed an answer to a motion requiring him to turn over moneys alleged to have been collected for his client, the failure of the client to file a reply thereto was not an admission of the facts stated, since, by Code Iowa, § 2910, such motions are required to be heard without written pleadings.—*State v. Morgan*, Iowa, 45 N. W. Rep. 1070.

14. BANKRUPTCY—Jurisdiction.—The jurisdiction of all matters in bankruptcy vested in the federal courts is not exclusive of that of the State courts to entertain an action for the abatement of liquor nuisance on property belonging to the bankrupt estate, that being a matter of police regulation, which does not interfere with the bankrupt jurisdiction of the federal courts.—*Radford v. Thornell*, Iowa, 45 N. W. Rep. 890.

15. BASTARDY—Judgment.—Where bastardy proceedings are instituted before a justice, and judgment rendered against the defendant, in his absence, and certified to the circuit court, in accordance with Rev. St. Ind. 1881, § 986, a subsequent proceedings before another justice, begun by collusion, without the knowledge of the prosecuting attorney, and in which the prosecutrix, being of weak mind, is induced to acknowledge that suitable provision has been made for her child, is no bar to the action.—*Ice v. State*, Ind., 24 N. E. Rep. 682.

16. CARRIERS—Limiting Liability.—A provision in a carrier's receipt that, if the value of the goods delivered is not stated by the shipper at the time of shipment, and specified in the receipt, the holder will not demand more than a particular sum for loss or damage, exempts the carrier from greater liability, only when the loss occurs without negligence on its part, and the burden is on the carrier to show absence of negligence.—*Southern Exp. Co. v. Seide*, Miss., 7 South. Rep. 547.

17. CARRIERS OF PASSENGERS—Negligence.—There is no variance between the allegations of the petition that defendant stopped its cars to allow plaintiff to alight, and negligently put them in motion while plaintiff was leaving the car, and proof that the car slackened up only and then started up with a sudden jerk, etc.—*Rindenhour v. Kansas City Cable Ry. Co.* Mo., 13 S. W. Rep 889.

18. CONSTITUTIONAL LAW — Intoxicating Liquors.—Act Pa. April 9, 1869, entitled "An act to prohibit the issuing of licenses" in certain boroughs, in section 1 forbids the issuing of such licenses, and in section 2 imposes a punishment for selling liquor in such boroughs: *Held*, that section 2 was unconstitutional, its subject not being clearly expressed in the title.—*Commonwealth v. Frantz*, Penn., 19 Atl. Rep. 1025.

19. CORPORATIONS—Stockholders.—A stockholder of a corporation is bound by the decree of a court of competent jurisdiction, in a suit by the creditors against it, though he be a non-resident, and not personally served.—*Howard v. Glenn*, Ga., 11 S. E. Rep. 610.

20. CORPORATIONS—Directors.—A stockholder and director of a corporation may attach its property for a valid debt due him, and such attachment has priority of subsequent liens created, either by mortgage or

attachment, in favor of other creditors.—*Rollins v. Shaver Wagon & Carriage Co.*, Iowa, 45 N. W. Rep. 1037.

21. CORPORATION—Officers.—Where a court of equity has acquired jurisdiction of a corporation as a party to proceedings for a receiver, and its president, on whom the rule *nisi* against the company has been served, has come into court, answered in his individual capacity, and taken part in the proceedings, the court may attach him for contempt in refusing to obey its order directing the company to turn over its assets in his possession to the receiver, although he has not been made individually a party to the proceedings.—*Tolleson v. People's Sav. Bank*, Ga., 11 S. E. Rep. 599.

22. CORPORATION—Pleading.—When plaintiffs sue as trustees of an incorporated society, of a kind authorized by statute, the name under which the suit is prosecuted imports a corporation, and shows a capacity to sue.—*Smythe v. Scott*, Ind., 24 N. E. Rep. 685.

23. COUNTY-SEATS—Location.—A county-seat will remain precisely where it was originally located, until changed or removed under the provisions of the constitution and statutes of the State; and *held*, where a county-seat was located upon the territory of an incorporated city, and afterwards the boundaries of such city were enlarged, this extension of the boundaries of the city did not have the effect to extend the boundaries of the county-seat, but the county-seat remained precisely where it was originally located.—*State v. Board of County Commrs.*, Kan., 24 Pac. Rep. 87.

24. COVENANT—Deed.—Where, in an action for a breach of warranty because of want of title to a vein of coal in the land conveyed, it is clearly shown that the vendees knew that the vendor did not own the coal, and did not intend to include it in the sale, it is proper to submit the case to the jury to determine whether the evidence is sufficient to justify a reformation of the deed.—*Stafford v. Giles*, Penn., 19 Atl. Rep. 1028.

25. CREDITORS' BILL—Parties.—When it appears that all the parties necessary to a proper and complete determination of an equity cause were not before the district court, the supreme court may remand the cause for the purpose of having such parties brought in.—*Smith v. Shaffer*, Neb., 45 N. W. Rep. 926.

26. CRIMINAL EVIDENCE — Burglary.— Where stolen goods are found in the possession of a defendant, charged with burglary, shortly after the commission of the offense, a charge that "the jury must be satisfied that he did not get possession of them by committing any burglary or larceny, but that he got possession of them in an honest way," is error.—*Falvey v. State*, Ga., 11 S. E. Rep. 607.

27. CRIMINAL EVIDENCE—Character.—An instruction that "good character is always of importance, and is evidence to be duly considered by the jury, and may turn the scale where there is a reasonable doubt as to the degree or grade of the crime," is erroneous as limiting the effect of such evidence to the case where there is a reasonable doubt, whereas it may create such doubt.—*Commonwealth v. Cleary*, Penn., 19 Atl. Rep. 1017.

28. CRIMINAL LAW — Card-playing.—One who keeps watch for the purpose of guarding against detection of others, who are playing cards in a public place, is himself a principal in the offense.—*Earp v. State*, Tex., 13 S. W. Rep. 888.

29 CRIMINAL LAW—Prior Conviction.—Under Pen. Code Cal., § 1093, providing that where one indicted for felony is also charged with a prior conviction, which he confesses, the clerk, in reading the indictment to the jury, shall omit all that relates to such former conviction, it is prejudicial error to direct the clerk, reading an indictment for robbery, to read that part charging a prior conviction for burglary, which was confessed, and permit him to announce that "the defendant confessed the same, and was guilty."—*People v. Sansome*, Cal., 24 Pac. Rep. 143.

30. CRIMINAL PRACTICE—Forgery.—Pen. Code Cal., § 115, makes it felony to cause to be recorded a false or forged instrument only when the instrument, if genuine, might be recorded under some law of the State or the United States. There is no statute authorizing the recording the assignment of letters patent: *Held*, that an indictment which set forth the recording of a forged assignment of letters patent, and, in addition, a charge of forgery, was not bad as charging two offenses.—*People v. Harrold*, Cal., 24 Pac. Rep, 106.

31. DEDICATION.—Under the facts, *held* that land was formally dedicated to and accepted by the city as a park.—*Plumb v. City of Grand Rapids*, Mich., 45 N. W. Rep. 1024.

32. DEED—Reformation—Description.—The court will correct an error in the description contained in the report of a surveyor appointed to locate and mark a line dividing a body of land in partition proceedings, and a corresponding error in the commissioner's deeds referring thereto, where it appears that the bidders at the sale, and the transferee of one of them, all purchased with reference to the line as actually located and marked, and in ignorance of the errors in describing it.—*Wilson v. Jasper*, Ky., 13 S. W. Rep. 885.

33. EASEMENTS—Location.—Where a right of way is described in the grant as "on or near" a designated boundary line, the location of the way is made certain and definite by the erection of a fence by the grantor fixing its northern limit, and its use for many years as such by the grantee; and the fact that the parties afterwards discover that the true boundary line is three rods further south than they supposed it to be when the grant was made, and the way fixed, will not affect the grantee's rights therein.—*Fritsche v. Fritsche*, Wis., 45 N. W. Rep. 1088.

34. EJECTMENT—Bill of Particulars.—Under Code Miss., § 2491, requiring either party in ejectment on demand of the other party to file a bill of particulars, giving an abstract of the title under which he claims, and providing that in default thereof no evidence of such title shall be given, the bill, when filed, is an admission of record that the party claims under the chain of title therein referred to, and, where the bills of both parties set out a common source, plaintiff need not establish the chain of title back of such source.—*Gillum v. Case*, Miss., 7 South. Rep. 550.

35. EJECTMENT—Title.—Recovery in ejectment being only on strict legal title, ejectment cannot be maintained on a State certificate of purchase, which is but a contract for a patent on compliance by the purchaser with its terms, though such certificate is made by the State statutes *prima facie* evidence of title.—*Sweatt v. Burton*, U. S. C. C. (Cal.), 42 Fed. Rep. 285.

36. ELECTION—Polling Place.—Under Comp. St. Mont., div. 5, § 1013, which provides that the clerk shall post, at least 30 days before any general election, notice of the house at which the election will be held, the vote of the precinct will be invalidated by the removal of the voting place by the judges from the house designated to one more than three miles off.—*Heyfron v. Mahony*, Mont., 24 Pac. Rep, 93.

37. EMINENT DOMAIN—Railway Tracks.—Where gates and barriers for the protection of the public are built and maintained in the street upon plaintiff's lot, by a railway company, in compliance with an order of the common council, the company is not liable in damages for a taking of the property.—*Trustees v. Milwaukee, etc. R. Co.*, Wis., 45 N. W. Rep. 1086.

38. EQUITY — Chattel Mortgages.—Where mortgaged chattels were seized and sold on execution at the instance of an unsecured judgment creditor, and the proceeds are in the sheriff's hands, such creditor cannot maintain a suit in equity to have the mortgages declared fraudulent and void, as his remedy at law is complete.—*Mackey v. Michelstetter*, Wis., 45 N. W. Rep. 1087.

39. EQUITY—Good Faith.—In a suit by a village to have certain of its bonds declared void, and to restrain defendant from negotiating them, it appeared that, for the purpose of obtaining money to be used in inducing a railroad company to construct a road through the village, it secured the passage of an act of the legislature authorizing it to borrow money, and issue bonds

therefor, to be used in making public improvements within the village. The bonds were turned over to the railroad, and were negotiated: *Held*, that as complainant was attempting to do an illegal act under the representation that it wanted the money for public improvements, equity would not lend its aid.—*Village v. Schlick*, Mich., 45 N. W. Rep. 894.

40. ESTOPPEL — Homestead. — Creditors are not estopped from subjecting the lands of a decedent to the payment of their claims by the lapse of more than nine years from his death, when it appears that the executor has, during that time, improperly failed to have such lands sold for the payment of debts.—*Schlarb v. Holderbaum*, Iowa, 45 N. W. Rep. 1051.

41. EVIDENCE—Adultery.—In an action for criminal conversation with plaintiff's wife, and for the alienation of her affections, it is error to allow plaintiff to testify to a conversation had with his wife just before marriage, in which she stated that she must be allowed to remain with defendant, at whose house she was then living, while his wife was absent under the care of a physician, where defendant was not present when the conversation took place.—*Carter v. Hill*, Mich., 45 N. W. Rep. 988.

42. EXECUTION—Contract for Land.—The interest of a vendee under a subsisting contract for the sale of land, under which he has entered and made improvements and paid part of the purchase money, is subject to levy and sale upon execution.—*Reynolds v. Fleming*, Minn., 45 N. W. Rep. 1099.

43. EXECUTION — Forthcoming Bond.—Property released from execution under a forthcoming bond may be again levied on after the bond is forfeited and suit has been instituted thereon.—*Chesapeake Guano Co. v. Wilder*, Ga., 11 S. E. Rep. 618.

44. EXECUTORS AND ADMINISTRATORS—Claims.—Under the Iowa statute, providing that claims against the estate of a decedent, filed within a certain period after notice of the appointment of a personal representative, are entitled to be paid in a certain order, valid claims presented to an administratrix, and approved by her, within such statutory period, are entitled to such rank, though not formally filed.—*In re Wonn's Estate*, Iowa, 45 N. W. Rep. 1063.

45. FRAUDULENT CONVEYANCES — Parol Evidence.—Parol testimony to show fraud or simulation in a sale of immovable property of an ancestor, to the prejudice of forced heirs, may, in a certain class of cases, be introduced; but such evidence never can be introduced by the heirs, without the consent of the adverse party, to show title in the ancestor to such property.—*Dohan's Heirs v. Dohan*, La., 7 South. Rep. 569.

46. FRAUDULENT CONVEYANCES—Possession.—In a sale of personal property, where there is no immediate delivery followed by actual and continued change of possession, a fraudulent intent on the part of the seller, though not participated in by the buyer, avoids the sale as to creditors, under How. St. Mich., § 6190.—*Kipp v. Lamoreaux*, Mich., 45 N. W. Rep. 1002.

47. FRAUDULENT CONVEYANCES—Parent and Child.—Where a mother buys land for her daughter, with the intention of conveying it to her, and after taking title in her own name conveys the land to her daughter, such conveyance is not fraudulent as to a creditor of the mother, who recovers a judgment more than two years after the conveyance.—*Brown v. McCormick*, Penn., 19 Atl. Rep. 1026.

48. GAMBLING CONTRACT—Public Policy.—A contract whereby defendant gave the note sued on in consideration of the sale to him of 40 bushels of "prolific oats at $15 per bushel as a speculation," and the obligations of the payee "that on or before the first day of September, 1883, we hereby agree to sell to responsible parties eighty bushels" of defendant's grain "at $15 per bushel, for which he agrees to take his pay in notes," was not a gambling contract within the meaning of Code Iowa, § 4029, providing that notes given for money lost in gambling should be void. Such contract was, however, against public policy and void.—*Merrill v. Packer*, Iowa, 45 N. W. Rep. 1076.

49. GARNISHMENT—Disclosure—Contempt.—A debtor refusing to testify as to the disposition of notes given him by a garnishee, and which are not in the garnishee's hands at the time of the service of the writ of garnishment, may be judged guilty of contempt, under How. St. Mich. §§ 8081, 8083.—*Barnes v. Reilly*, Mich., 45 N. W. Rep. 1016.

50. GARNISHMENT—Jury.—Code Iowa, § 2808, which provides that, "in all actions, the jury, in their discretion, may render a general or special verdict," applies to a case where the disclosure of one garnished on a judgment are controverted; and it was error to direct that special findings only should be returned as to the issues thus raised.—*Shadbolt & Boyd Iron Co. v. Camp*, Iowa, 45 N. W. Rep. 1062.

51. HOMESTEAD.—Where husband and wife sold and conveyed homestead land secured under the constitution of 1868, with no leave so to do, that the beneficiaries of the homestead used and enjoyed the proceeds of the sale will not bar a recovery of the land; but money thus used and enjoyed may be set-off against mesne profits for which the purchaser is liable.—*Timothy v. Chambers*, Ga., 11 S. E. Rep. 598.

52. HUSBAND AND WIFE—Contract.—Though Code Ga. § 1783, prohibits a married woman from becoming surety to her husband, from assuming his debts, and from making a sale of her separate estate to his creditor in extinguishment of his debts, a note and mortgage given by her for money borrowed by herself are not rendered void by the fact that she afterwards permits her husband to use the money, and that the creditor understands, when the loan is made, that the husband may have the use of it; the creditor not being a party to the agreement between husband and wife.—*White v. Stocker*, Ga., 11 S. E. Rep. 604.

53. HUSBAND AND WIFE—Wife's Separate Property.—Personalty consisting of stock and crops, the product of a farm owned by the wife, who with her boys labored as hands on the farm, is her individual property, and cannot be subjected to her husband's debts.—*Hoag v. Martin*, Iowa, 45 N. W. Rep. 1058.

54. INJUNCTION—Riparian Owners.—The owners in severalty of different tracts of land may join in a bill for injunction to restrain the diversion of the waters of a stream along whose banks their lands are located, and in which they have riparian rights, and rights acquired by appropriation.—*Churchill v. Lauer*, Cal., 24 Pac. Rep. 107.

55. INSURANCE—Conditions.—The forfeiture created by the breach of a condition in an insurance policy, prohibiting the use of gasoline in the building, is not waived because the company's agent, whose authority was limited to soliciting insurance, delivering policies, and receiving the premiums, consented that the building might be used as a restaurant, which included the use of a gasoline stove, or because the agent required proof of loss at the expense of the insured without claiming the forfeiture.—*Garretson v. Merchants' & Bankers' Ins. Co.* Iowa, 45 N. W. Rep.—

56. INSURANCE—Conditions.—A policy of fire insurance contained stipulations enumerating various causes which should work a forfeiture, and release the company from all liability. It then specified that proof of loss should be made within 30 days, and finally stipulated that no action should be maintained until all its conditions had been complied with by the assured, and that any action should be barred unless brought in six months after loss: *Held*, failure so make proof of loss within 30 days did not forfeit the policy, but only postponed the right of action till furnished.—*Kenton Ins. Co. v. Downs*, Ky., 13 S. W. Rep. 882.

57. INSURANCE—Occupation.—In an action on a policy of fire insurance, the question whether the insured building had become vacant and unoccupied is one of fact.—*Rockford Ins. Co. v. Storig*, Ill., 24 N. E. Rep. 674.

58. JUDGMENT Redemption.—Where a judgment

creditor's right to redeem land sold under a decree of foreclosure against his debtor, to which such creditor was not made a party, is sought to be defeated in an action to redeem by setting up a sale of land to befendant before the judgment was rendered, the burden is on defendant to show such prior sale.—*Hodge v. Dent*, Iowa, 45 N. W. Rep. 1031.

59. JUDGMENT Creditors.—A judgment creditor has no right to the products of his debtor's labor, which became as soon as produced the property of a third person, and it is immaterial that the debtor refused to make the contract to furnish the products directly, fearing that they might be subjected to the judgment debt, but procured the contract to be made by his wife, —*Buckley v. Dunn*, Miss., 7 South Rep. 550.

60. JUDGMENT NUNC PRO TUNC.—A petition to the ordinary to enter as his judgment *nunc pro tunc* an order passed by him, at a former term, discharging executors, is bad on demurrer, where it fails to state that the application for the grantin; of the order of discharge was made in writing, as required by Code Ga. § 4114.—*Farmer v. Rogers*, Ga., 11 S. E. Rep. 614.

61. JUDGMENT—Set off.—In an action to revive a judgment, evidence of set-off is not admissible.—*Goodhart v. Bishop*, Penn., 19 Atl. Rep. 1026.

62. LANDLORD AND TENANT—Detainer Bond.—Under Code Ga. § 4084, where an affidavit was prepared and bond executed and approved in time, and the officer, on being so informed, requested the tenant's counsel to retain the custody thereof until called for, and he received them two days after the time for filing expired, a refusal to enforce the execution of the writ by *mandamus* was proper.—*Kaiser v. Berrie*, Ga., 11 S. E. Rep. 602.

63. LIBEL—Publication.—The publication of a cut or drawing, picturing a person as a jackass, following it with a written article in which he is ridiculed as "an egotistical, over-estimated, self-conceited jackass, who claims the name of James Moley," intending thereby to subject him to social disgrace, hatred, or contempt, is libelous *per se*.—*Moley v. Baruger*, Wis., 45 N. W. Rep. 1082.

64. MALICIOUS PROSECUTION.—A declaration alleged that defendant falsely and maliciously, and without any reasonable or probable cause, procured a summons to be issued by a justice against the plaintiff, in favor of one of the defendants, and served; that on the return day of the summons, without any reasonable or probable cause, they procured a judgment to be rendered against plaintiff, knowing that there was no jurisdiction to render such judgment; that they procured an execution to be issued upon such judgments and that, by means of threats to levy such execution upon plaintiff's property, and representations that the execution was good, they induced plaintiff to pay a sum of money in satisfaction of the execution: *Held*, to state a cause of action in trespass on the case.—*Antcliff v. June*, Mich., 45 N. W. Rep. 1019.

65. MANDAMUS.—A sheriff holding an order for the sale of real estate cannot be required, by writ of *mandamas*, to publish the notice of sale in a newspaper selected by the plaintiff.—*Winton v. Wilson*, Kan., 24 Pac. Rep. 91.

66. MASTER AMD SERVANT—Fellow-servants.—A telegraph operator employed by a railroad company to give information in regard to the location of trains on the road, and to communicate to the operators on the trains instructions for running them, received by him from the train dispatcher, is a fellow-servant of the fireman on such trains.—*McKaig v. Northern Pac. R. Co.* U. S. C. C. (Minn.), 42 Fed. Rep. 288.

67. MASTER AND SERVANT—Negligence.—On the trial of an action wherein negligence is charged, whereby plaintiff was injured, it is not only incumbent on the plaintiff to show by competent evidence that there was a breach or neglect of legal duty by defendant, but that the injury sustained by the plaintiff was the direct and natural result and consequences of such neglect or breach.—*Larson v. St. Paul & D. R. Co.* Minn., 45 N. W. Rep. 1096.

68. MASTER AND SERVANT—Risks of Employment.—In an action for personal injuries sustained by a workman employed in running lumber through an alleged defective and unsafe edger in defendant's saw-mill, a special finding by the jury, in the alternative, that the want of repair in the edger consisted of cracked or broken rollers, "or rollers that were worn out of proper form by use," is too indefinite and uncertain to be allowed to aid in supporting a judgment in plaintiff's favor.—*Sherman v. Menomonee River Lumber Co.*, Wis.. 45 N. W. Rep. 1079.

69. MEASURE OF DAMAGES—Interest.—In an action for a tort, it is erroneous to instruct the jury that the plaintiff is entitled to interest on the amount of his damages. —*Emerson v. Schoonmaker*, Penn., 19 Atl. Rep. 1025.

70. MECHANICS' LIENS.—Where a subcontractor fails to file his statement of material furnished within 30 days from the date of the last item furnished, as required by McClain's Code Iowa, § 3315, in order to preserve his lien and prevent payment to the principal contractor, and the owner of the property pays the principal contractor, a statement and notice, subsequently made by the subcontractor, does not create a lien.—*Hugg v. Hintrager*, Iowa, 45 N. W. Rep 1035.

71. MORTGAGE—Accounting.—In a suit by a mortgagor for an accounting and reconveyance from the mortgagee, the surety who has paid the mortgage note is a necessary party.—*Hunt v. Rooney*, Wis., 45 N. W. Rep. 1084.

72. MORTGAGES—Construction.—A contract purporting to be a sale *a remere*, which divides the price, which was for an antecedent debt, to be returned in two installments, and declares the forfeiture of the right to redeem on a failure to pay the first installment due, is pignorative in character, and an *antichresis*.—*Payne v. Habbard*, La., 7 South. Rep. 572.

73. MORTGAGE—Foreclosure.—A conveyance of land, by the purchaser at a foreclosure sale, to a person who had a contract for the land before the sale, is consideration for a mortgage, whether or not the latter was made a party to the foreclosure suit; for, if his right under his contract was not cut off by the suit, the conveyance at least assigned the mortgaged debt.—*Wilson v. White*, Cal., 24 Pac. Rep. 114.

74. MORTGAGE—Foreclosure—Pleadings.—In a suit to foreclose a mortgage, where defendant answered generally, and also pleaded in bar a prior adjudication, the trial should be upon the merits, and not confined to the plea in bar alone.—*Coleman v. Hunt*, Wis., 45 N. W. Rep. 1085.

75. MUNICIPAL CORPORATIONS—Defective Sidewalks.—In an action for injuries caused by a defect in a sidewalk, evidence of other defects, in close proximity to the one causing the injury, is admissible as tending to show notice to the municipal authorities of such defect. *O'Neil v. Village of West Branch*, Mich., 45 N. W. Rep. 1023.

76. MUNICIPAL CORPORATIONS—Street Assessments.—An action to enjoin the collection of an assessment made by a city of the first-class to curb and pave its streets must be commenced within 30 days from the time when the amount of such assessment is ascertained, or the action will be barred by § 1, ch. 101, Laws 1887.—*City of Topeka v. Gage*, Kan., 24 Pac. Rep. 82.

77. NEGLIGENCE — Bridges.—In an action against a county for an injury to plaintiff's team and threshing outfit, caused by the breaking of a bridge while attempting to drive across, it is for the jury to determine whether the use which plaintiff was making of the bridge was unusual and extraordinary, and such as the county was not bound to anticipate; and it is error for the court to decide this question, and to direct a verdict in the county's favor.—*Yordy v. Marshall County*, Iowa, 45 N. W. Rep. 1042.

78. NEGLIGENCE — Dangerous Premises.—Defendant, keeper of a restaurant, displayed certain attractive articles in a show-window, in front of which was a

cellar-way covered with boards. By the negligence of a third person, to whom defendant had let the opening for the purpose of selling various articles, it was left partially uncovered, and plaintiff, walking upon the boards, fell into the hole and was injured: *Held*, the negligence of such person was chargeable to defendant, and he is liable.—*Folsom v. Lewis*, Ga., 11 S. E. Rep. 606.

79. NEGLIGENCE—Defective Highways.—In an action against a township for personal injuries sustained in an accident on its highway, it appeared that the road, at the place of the accident, ran on an embankment about five feet high, and from nine to fourteen wide at the top. Plaintiff's horse shied at a log lying beside the road, and, being cut with the whip, plunged down the embankment and turned the buggy over: *Held*, that an instruction that "it made no difference what frightened the horse, if the negligence of the township was the cause of the accident not being prevented," was error, for such negligence would be the remote, and not the proximate, cause of the accident.—*Beall v. Township of Athens*, Mich., 45 N. W. Rep. 1014.

80. NEGLIGENT KILLING OF CHILD.—Under the law in Georgia in April, 1886, the parent's only right of action for the negligent killing of a minor child was for the loss of services of such child; and a declaration which lacks an allegation to this effect is fatally defective, though it avers that petitioner sues "for the financial value of the life of her said minor son."—*Perry v. Georgia Railroad & Banking Co.*, Ga., 11 S. E. Rep. 605.

81. NEGOTIABLE INSTRUMENT—Bona Fide Holder.—In an action on a promissory note by an indorsee, an instruction given that if he knew that the note was fraudulently obtained, or had such notice as would put a reasonable man on inquiry as to its illegality, it would show bad faith, and he could not recover, was more favorable to defendant than he was entitled to.—*Helms v. Douglas*, Mich., 45 N. W. Rep. 1009.

82. PARTITION—Venue.—Civil Code Ky., tit. 10, ch. 15, providing that actions for the division of the lands of a decedent, the allotment of dower therein, and sales to pay debts shall be brought in the county in which the greater part thereof is located, has no application to an action for the sale of other lands, which are owned jointly by the heirs of the deceased, and located in another county, and in which there is no right to an allotment of dower.—*Danforth v. Moss*, Ky., 13 S. W. Rep. 881.

83. PARTNERSHIP — Construction.— Plaintiff and defendant entered into a partnership for the practice of medicine; a bonus of $3,100 being paid by plaintiff to defendant. The contract of partnership stipulated that "the partnership shall continue for the term of 10 years from this date, unless sooner terminated by mutual consent, or by notice, which shall be in writing, and delivered sixty days before taking effect:" *Held*, that defendant had a right to terminate the partnership without cause, at any time, on giving the required notice.—*Swift v. Ward*, Iowa, 45 N. W. Rep. 1044.

84. PLEADING—Affidavit of Defense.—An affidavit of defense that suit was not begun within six years from completion of the contract, and that defendant has made no new promise, is sufficient to prevent summary judgment on a book-account, the last entry of which was over six years old, but while plaintiff avers "became due and payable" at a time within six years.—*Fritz v. Hataway*, Penn., 19 Atl. Rep. 1011.

85. PRACTICE—Continuance.—The refusal to continue a case because of the inflamed condition of counsel's eyes is not an abuse of the court's discretion, where he was before the court at the time, and immediately proceeded to conduct the trial in person.—*Hawes v. Clark*, Cal., 24 Pac. Rep. 116.

86. PRACTICE—SERVICE OF PROCESS.—A letter authorizing a person to acknowledge service of the declaration on behalf of a defendant invests him with no authority to waive process.—*Clarke v. Morrison*, Ga., 11 S. E. Rep. 614.

87. PRIVILEGED COMMUNICATIONS.—Evidence of a doctor that he attended a certain person professionally, as to the number and dates of his visits, and that he was the family physician of such person, is not within the prohibition of How. St. Mich. § 7516, providing that a physician shall not disclose any information which he may have acquired in attending any patient in his professional capacity.—*Breisenmeister v. Supreme Lodge*, Mich., 45 N. W. Rep. 977.

88. RAILROAD COMPANIES—Accidents at Crossings.—In an action against a railroad company for personal injuries sustained at a place where two railroads crossed each other, an instruction that it was the duty of defendant to ring the bell and blow the whistle of its engine, on starting at such crossing, is error, since Rev. St. Tex. art. 4232, relating to railroad crossings, does not require such signals.—*Houston & T. C. Ry. Co. v. Brin*, Tex., 13 S. W. Rep. 886.

89. RAILROAD COMPANIES—Fires.—After a fire started on defendant's right of way, by its negligence, had been apparently extinguished, a wind arose, and the next day a fire in that vicinity spread to plaintiff's land, and damaged his property: *Held*, that the question whether defendant's negligence was the proximate cause of plaintiff's loss should be left to the jury.—*Haverly v. State Line & S. R. Co.*, Penn., 19 Atl Rep. 1013.

90. RAILROAD COMPANIES—Negligence.—Where defendant's track passed very close to the track of another company, and it was the custom of the employees of the latter company, not objected to by defendant, to step upon defendant's track in making signals, the signaling being done for the protection of the property of defendant as well as of the other road, an employee of such other road, who stepped upon defendant's track for the purpose of signaling, was not a trespasser, so as to preclude a recovery for injuries received from defendant's locomotive.—*McMarshall v. Chicago, R. I. & P. Ry.*, Iowa, 45 N. W. Rep. 1065.

91. RAILROADS—Right of Way.—A grant to a railroad company of a right of way "not exceeding one hundred feet in width," with the right to use "so much land as the officers may deem necessary," is not an absolute grant of 100 feet; and the company having located its road, occupying a narrower strip, and having acquiesced for years in the occupation of the land bordering on the strip by other grantees, cannot eject them, and widen its right of way.—*Vicksburg & M. R. Co. v. Barrett*, Miss., 7 South. Rep. 549.

92. RAILROADS—Street Crossings.—When the city ordinances prescribe certain precautions to be observed by railway companies at public crossings, they do not relieve the companies from the observance of ordinary care in particulars not mentioned in the ordinances.—*Wilkins v. St. Louis, I. M. & S. R.y Co.*, Mo., 13 S. W. Rep. 893.

93. REPLEVIN—Pleading.—An assignee in insolvency proceedings brought replevin against his assignor to recover certain hay which he alleged was not delivered to him under the assignment. The answer denied that defendant was ever owner, or in possession, or entitled to possession, of the hay: *Held*, that the answer made an issue, and the plaintiff was not entitled to a judgment upon the pleadings.—*Martin v. Porter*, Cal., 24 Pac. Rep. 109.

94. SALE—Good-will.—In the sale of the effects in any business, where an itemized account is made, and a valuation is attached to each item, and no mention is made of the "good-will" of the business, evidence cannot be received to contradict the written act of sale so as to show that the "good-will" formed a part of the act of sale.—*Herbert v. Dupaty*, La., 7 South. Rep. 580.

95. SALE—Representations.—In an action on a contract to take a threshing-machine, and to execute notes therefor, the defense was a breach of the implied warranty that it was suitable for the purpose for which it was intended: *Held*, that it was proper to admit evidence of representation made by plaintiff's agent as to the excellence of the machine, and of his conversations wherein he gave defendants permission to take it

without first giving their notes therefor.—*Davis v. Sweeney*, Iowa, 45 N. W Rep. 1040.

96. SALE—When Title Passes.—Under a written agreement for the sale of a newspaper business of which possession is not to be delivered until a future day, which provides, among other things, for the the sale of "the subscription list and subscription accounts," the purchaser is entitled to the subscription accounts collected by the seller between the execution of the agreement and the delivery of possession.— *Claybaugh v. Goodchild*, Penn., 19 Atl. Rep. 1015.

97. SALE—When Title Passes.—Where it is expressly provided in a contract for the sale of lumber that it "shall belong to the seller until shipped," the title, there to remains in him, and the lumber cannot be seized for taxes due by the purchaser on other property.—*Hovey v. Gow*, Mich., 45 N. W. Rep. 986.

98. SCHOOL SUPERINTENDENT—Compensation.—Under How. St. Mich. § 5134, par. 5, authorizing the board of school trustees to employ such officers and servants as may be necessary for the management of the schools and the school property, to fix their compensation and prescribe their duties, one employed as superintendent, not being a teacher is not required to have the certificate required by law to qualify one for employment as a teacher.—*Davis v. School District*, Mich., 45 N. W. Rep. 989.

99. SURETY—Mortgages.—Suretyship evidenced in writing must be enforced, in the absence of documentary proof or unequivocal oral testimony distinctive of the contract.—*Rench v. Keenan*, La., 7 South. Rep. 889.

100 TAXATION—Tax-list.—The filing, in the office of the clerk of the court, a certified copy of the resolution of the board of the county commissioners, designating the newspaper in which the delinquent tax-list is to be published, is a jurisdictional prerequisite to a valid publication of the list, and the omission to do so renders the judgment entered thereon void.—*Merriman v. Knight*, Minn., 45 N. W. Rep. 1098.

101. TRESPASS—Declaration.—How. St. Mich. § 7759, providing that "where, by the wrongful act of any person, an injury is produced either to the person, personal property, or rights of another, * * * for which an action of trespass may by law be brought an action of trespass on the case may be brought to recover damages," does not apply to trespass on lands. —*Wood v. Michigan Cent. A. L. R. Co.*, Mich., 45 N. W. Rep. 980.

102. TRIAL INSTRUCTIONS.—It is an error to refuse to give a special instruction which correctly states the law, and is material under the evidence, unless the court, in its general instructions, sufficiently instructs the jury upon the matter presented by the special instruction asked and refused.—*Missouri Pac. Ry. Co. v. Cassity*, Kan., 24 Pac. Rep. 88.

103. TRUSTS—Constructive.—The funds of a township can be recovered from the assignee of an insolvent bank, in which they were deposited by the township clerk in his own name, though known to the bank to be township funds.—*Bunton v. King*, Iowa, 45 N. W. Rep. 1050.

104. TRUSTS—Corporations.—Plaintiff and defendant entered into a contract whereby defendant was to buy certain mining property, and plaintiff was to perfect the title by foreclosing a certain trust-deed on the property, and buy it at a foreclosure sale, and was also to obtain patents, the proceeds of the property to be used first to reimburse defendant, and then plaintiff, and the residue to be divided between them: *Held* that, upon purchase by defendant, plaintiff became vested with a beneficial interest in the property; the performance of the contract by him not being a condition precedent to his acquiring such interest.—*Bates v. Wilson*, Colo., 24 Pac. Rep. 99.

105. TRUST—Priorities.—The treasurer of plaintiff corporation, induced by the president of another corporation, discounted a note executed by it to plaintiff, and without authority paid it the proceeds, or the promise of the president that the money would be repaid by a certain time. This latter corporation subsequently became insolvent, and assigned for the benefit of creditors. Plaintiff petitioned that the assignee be ordered to pay the full amount of its claim on account of this money paid to his assignor: *Held*, that this was a trust fund, known to be such by the assignor when it came to its hands, and that plaintiff was entitled to priority over all the other creditors, and to enforce the trust against the property of assignor.—*Davenport Plow Co. v. Lamp*, Iowa, 45 N. W. Rep. 1049.

106. VENDOR AND VENDEE—Title.—The rules announced by this court in Townshend v. Goodfellow, 40 Minn. 312, Fairchild v. Marshall, 43 N. W. Rep. 563; and Hedderly v. Johnson, 44 N. W. Rep. 527—in respect to the marketability of a title to real property, applied to the facts of this case.—*Richmond v. Koenig*, Minn., 45 N. W. Rep. 1093.

107. WATERS—Surface Water.—The owner of an upper estate, on which he has erected a house, has no right to collect the waters which fall upon his roof into gutters, and from thence, by means of a conducting pipe, transfer and discharge them, although upon his own land, at such a place and in such a manner that, necessarily and inevitably, they are precipitated upon lower premises in an unnatural, unusual, and injurious volume and quantity.—*Beach v. Gaylord*, Minn., N. W. Rep. 1095.

108. WATERS—Water Companies.—A private corporation, vested with the right of eminent domain for the purpose of supplying a city with water, does not, by the mere purchase of land on which is a spring, acquire the right to divert the water of the spring from its natural channel, in order to supply the city with water, without making compensation or tendering security, since its purchase of the land gives it merely the rights of a riparian owner.—*Lord v. Meadville Water Co.* Penn., 19 Atl. Rep. 1007.

109. WILL.—A will contained this clause: "I give and bequeathe to my son M a sum of money which shall be of equal value with the share bequeathed to my other sons. The said sum of money to be placed on interest by my executors, and the interest thereof to be paid annually to my said son * * * during his natural life. In case the said M should die and leave no legitimate heirs of his own body, then the sum bequeathed to him shall revert to my other heirs:" *Held*, that said son took but a life-estate in the money.—*Appeal of Eichelberger*, Penn., 18 Atl. Rep. 1006.

110. WILLS—Construction.—A devise of one-third of testator's property to his wife for life, and on her death "to my children equally, who may then be living, and to their heirs and assigns forever," passes, on the death of the wife, to those children of testator who survive her only, exclusive of heirs of testator's children who die during the widow's life-time, where the will clearly divides the balance of testator's property equally among all his children.—*Patchen v. Patchen*, N. Y. 24 N. E. Rep. 695.

111. WILL—Construction.—Where a will provides that the testator's estate shall be divided among his children "share and share alike," and then states the amount in which each child is indebted to the estate, such debts should be deducted from the respective legacies.—*Appeal of Eichelberger*, Penn., 19 Atl. Rep. 1014.

112. WILLS—Rights of Legatees.—A devisee, who is also an heir of the testator, is entitled to share in a legacy to the testator's heirs which made a charge on the land devised to him.—*Appeal of Harman*, Penn., 19 Atl. Rep. 1021.

113. WITNESS—Examination.—Where plaintiff in an action for personal injuries fails to testify, and a fact of which plaintiff alone had knowledge is sought to be established by inference from other facts, it may be considered by the jury as a circumstance indicating that, if plaintiff had testified, her evidence would have tended to weaken her case.—*Cole v. Lake Shore & M S. Ry. Co.*, Mich., 45 N. W. Rep. 983.